88- 1720

Supreme Court, U.S.
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CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EDWARD J. WILSMANN,
Petitioner,
vs
THE UPJOHN COMPANY
AND
HOMEMAKERS, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Appellate Court have the right to confirm the District Court's summary judgment where the District Court's judgment was based solely on the Appellate Court's prior decision in the case, where

a) the Appellate Court vacated a jury verdict and retried the case on the issue of sufficiency of the evidence where

1) the Defendants/Appellees failed to raise the issue of sufficiency of the evidence in the Lower Court;

2) the Defendants/Appellees lied to the Appellate Court in claiming they had raised that issue in the Lower Court;

3) the Defendants/Appellees attorney who made the motion in the Lower Court admits the motion was inadequate to sustain the claim before the Appellate Court.

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Ralph Shrader, Inc v Diamond Int'l Corp, 833 F2d 1210, 1214 (CA 6, 1987) as quoted in the Appellate Court's Decision on Page 10, lines 5-7 . . . . . –

"All facts and inferences must be viewed in the light most favorable to the party opposing the motion."
Matsushita Electrical Industrial Co v Zenith Radio Corporation, 475 U S 574, 587 (quoting *United States v Diebold, Inc*, 369 U S 654, 655 (1962)) 10

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD J. WILSMANN,
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vs
THE UPJOHN COMPANY
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 9, 1989.

OPINIONS BELOW

The unpublished Decision of the Court of Appeals is reported at 865 F2d 1269 (CA 6, 1989) and is set out in the Appendix at A1. The written Opinion of the Court of Appeals is set out in the Appendix at A2-A15. The district court's opinion granting respondents' Motion for Summary Judgment is reported at 681 F Supp 424 (W D Mich, 1988) and is in the Appendix at A16-A19.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1989. This petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTE, RULES AND CONSTITUTIONAL PROVISION INVOLVED

Rule 50, Federal Rules of Civil Procedure provides:

Rule 50. Motion For A Directed Verdict and For Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE, EFFECT. . . A motion for a directed verdict shall state the specific grounds therefor...

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

Not later than 10 days after entry of judgment, a party who has moved for a directed verdict and any judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 38(a), Federal Rules of Civil Procedure states:

Rule 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate

Section 2072, 28 USC provides with regard to the Federal Rules of Civil Procedure:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law an as declared by the Seventh Amendment to the Constitution.

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

STATEMENT OF THE CASE

The only thing that has happened in this case in the last two and one-half years since the Appellate Court's original decision is the fact that the Lower Court awarded Upjohn a summary judgment on my remaining pendant state claims, saying, in effect, it had no alternative but to do so based on the Appellate Court's original decision in the case, which remanded those pendant state claims to the District Court in October, 1985.

Then the Appellate Court confirmed the District Court's decision, simply saying the Lower Court was correct in using the Appellate Court's original decision in arriving at its decision of summary judgment for Upjohn.

From the point of that original Appellate Court decision until today, we have acted like a couple of dogs chasing their own tails—the Court using all kinds of legal dicta to prove that the first opinion is binding on the entire case (that the decision was a good one, if you please)—and my attorneys trying to prove that it was a bad decision.

It really doesn't make a bit of difference whether that first decision of the Appellate Court was a good one or a bad one. That decision was made on an issue not properly before the court, so by law, that first decision must be overturned since, per our Constitution, the Appellate Court, of and by itself, has no authority to retry the case. The Constitution gives that right only to a jury.

I humbly beseech this Court to examine the law governing that first Appellate Court decision to see if it merits all of the credence assigned to it.

REASONS FOR GRANTING THE WRIT

I. GRANTING THIS PETITION IS NECESSARY TO PRESERVE PETITIONER'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AND TO PREVENT MANIFEST INJUSTICE WHERE THE APPELLATE COURT RETRIED THE CASE ON AN ISSUE NOT PROPERLY BEFORE IT.

When we became aware of the fact that Upjohn's attorney, the one who made the motion in the Lower Court, was heard bragging about the fact that they had gotten away with a lie to the Appellate Court, we petitioned that court for a rehearing and were again denied.

That happened at a time when I could still afford an attorney. His argument for a rehearing at that time so clearly sets out the facts that must be examined to recognize the err of the Appellate Court's original decision in this case, that I present it to this Court as the sole reason the writ of certiorari should be granted, as follows:

PRELIMINARY STATEMENT

> In rendering judgment on appeal reversing the jury verdict entered in favor of the plaintiff below, this Court found insufficient evidence to support the submission of plaintiff's claim of federal securities fraud to the jury. *Wilsmann v Upjohn Co*, 775 F2d 713, 720 (CA 6, 1985).

Plaintiff-appellant, cross-appellee, Edward J. Wilsmann ("Wilsmann"), in his petition for rehearing, argued that defendants-appellees, cross-appellants ("Upjohn") had failed to preserve for appeal the argument of insufficiency of evidence because their motion for directed verdict did not attack the sufficiency of the evidence in support of that portion of Wilsmann's federal securities law claim upon which the jury entered its verdict. (Petition for Rehearing ("Petition"), at 11-13. Excerpts from the Petition are attached hereto as Exhibit A.)

In responding to Wilsmann's petition, Upjohn's counsel broadly asserted that the motion for directed verdict did challenge sufficiency of the evidence on the entire securities fraud claim. (Response to Petition for Rehearing ("Response"), at 10. Excerpts from the Response are attached as Exhibit B.)

Following this Court's denial of Wilsmann's petition for rehearing, the Upjohn attorney who made the motion for directed verdict before the trial court admitted in a public place that the motion for directed verdict was insufficient and that Upjohn people probably did make the representations supporting Wilsmann's claim. (Affidavit of Patrick M. Walsh, attached hereto as Exhibit C.) This same attorney had joined in Upjohn's response to the petition for rehearing, which asserted that the motion for directed verdict was sufficient.

In light of Upjohn's attorney's admission of insufficiency of the motion for directed verdict, Wilsmann urges the Court to reconsider the denial of the petition for rehearing.

ARGUMENT

A. *Upjohn's Attorneys Represented to This Court, In Opposing the Petition for Rehearing, That Upjohn's Motion for Directed Verdict Challenged Sufficiency of the Evidence.*

Upjohn's response to Wilsmann's petition contains the following representation concerning the adequacy of the directed verdict motion made to the trial court:

At the close of Wilsmann's case, Upjohn's counsel moved for a directed verdict regarding, among other matters, Wilsmann's securities claim. In presenting the motion, Upjohn's counsel analyzed at length the evidence offered by Wilsmann regarding alleged misrepresentations, and specifically urged in conclusion that "there is not sufficient testimony to bring a claim for fraud to the jury..." (Response, at 10).

Among the attorneys who joined in that response was Dirk Holkeboer, the attorney who made the motion for directed verdict in question. (Response, at 15; Trial Transcript ("Tr."), at 886.)

The order denying Wilsmann's petition for rehearing (attached hereto as Exhibit B), specifically recites that the Court reviewed Upjohn's response as part of its deliberation on Wilsmann's petition.

B. *The Attorney Who Made Upjohn's Motion for Directed Verdict Has Admitted That the Motion Was Inadequate.*

Subsequent to the Court's denial of that petition, Dirk Holkeboer, Upjohn's attorney, admitted during a conversation in a restaurant in Kalamazoo, Michigan, that the motion for directed verdict was inadequate. Patrick Walsh, an attorney in the firm representing Wilsmann in the district court, overheard the conversation in which Mr. Holkeboer made this admission and identified himself to Mr. Holkeboer immediately thereafter. (Affidavit of Patrick Walsh, Exhibit C hereto.)[1]

As recited in Mr. Walsh's affidavit, in the course of talking about a trial in which he represented the Upjohn Company, Mr. Holkeboer stated: "They were right. I made the motion. I never mentioned sufficiency. I made the motion!" According to Mr. Walsh, Mr. Holkeboer, in referring to the evidence

[1] Mr. Walsh's affidavit was originally filed in September of 1986 with the district court in the case on remand with the Second Supplement to Plaintiff's Reply to Defendant's Motion for Summary Judgment. Upjohn has filed no response to that affidavit.

supporting the verdict, stated that: "There was this meeting of June 16, 1969. There was probably some loose talk at that meeting by the Upjohn people." Mr. Holkeboer was apparently referring to the meeting during which Upjohn and Wilsmann signed the first letter of intent, the same meeting at which Wilsmann testified that the "oral side agreement" of a "back end" payment was made. *See Wilsmann v Upjohn Co, supra,* 775 F2d at 721-21.

Despite representations made to this Court to the contrary, one of Upjohn's attorneys has acknowledged that Wilsmann's position on the inadequacy of the motion for directed verdict is correct.

C. *Upjohn's Motion for Directed Verdict Did Fail to Properly Preserve the Argument of Sufficiency of the Evidence in Support of the Jury Verdict for Appeal.*

The representation made in Upjohn's response that the motion for directed verdict challenged the sufficiency of the evidence of a guaranteed "back end" payment mischaracterizes the transcript of Upjohn's motion, which is reproduced in its entirety as Exhibit E hereto.

That representation, in partially quoting from page 890 of the transcript, cuts too short counsel's remarks. That quotation in full reads as follows:

> While plaintiff's testimony regarding a change from B to A (type of merger), or the interest charge or the detailment (sic) may be admissible as to scienter, there is not sufficient testimony to bring a claim for fraud to the jury *on those representations.* (Tr 890-91 (emphasis added).)

As is obvious from an analysis of Upjohn's motion, those remarks simply are not addressed to the representation of a guaranteed "back end" payment.

At the outset of Upjohn's directed verdict motion, counsel identified seven representations upon which

Wilsmann's securities fraud claim rested. (Tr 887-88.) The third identified representation was "that Plaintiff was promised a minimum payment and that the employment contract would be extended until the bonus equaled his minimum payment." (Tr 887.) Other enumerated representations included "that the merger would be type B tax free exchange" (Tr 887), "that interest on money loaned by Upjohn... would not be significant factor...for purposes of Plaintiff's incentive employment bonus" *(Id)*, and "that Upjohn's detailment (sic) (detail men) would be made available to. . . Homemakers" *(Id)*.

The sufficiency of the evidence argument, quoted only in part in Upjohn's response, addressed only the later three representations. With respect to the representation of a guaranteed "back end" payment, Upjohn's counsel immediately went on to state:

Defendants ask the Court to directed (sic) verdict as to each of the pled material inducements *except* the alleged promise for a guaranteed payment for a stipulated amount.

Finally, as to that claim which they have brought before the Court, the fraud claim *based on this alleged promise of a future payment*, Defendants move for a directed verdict on the ground that no evidence has been offered on the element of reliance. (Tr 891 (emphasis added).)

Clearly, therefore, Upjohn limited its challenge to the representation of a guaranteed "back end" payment to the single element of reliance. As Wilsmann pointed out in his petition, he testified at trial that he would not have proceeded with the Upjohn merger absent the representation of a guaranteed "back end" payment. (Petition, at p 12 n 2) Upjohn's response did not take issue with the sufficiency of the evidence on the element of reliance. Upjohn made no attack on the element of fact of the representation, the element the panel decision considered to have insufficient evidentiary support. In fact, by excepting the claim of a guaranteed "back

end" payment from the general argument of insufficiency (Tr 891), Upjohn conceded that sufficient evidence existed to support the fact of that representation.

Upjohn's selective reading of the trial transcript notwithstanding, its motion for directed verdict failed to preserve for appeal the sufficiency issue determined by the panel. Because Upjohn failed to challenge sufficiency of the evidence by a proper motion for directed verdict, this Court has no power to enter judgment in Upjohn's favor on appeal. *Rymer v Davis*, 754 F2d 198, 200 (CA 6), *vacated on other grounds*, 105 S Ct 3517 (1985).

Analysis of the motion for directed verdict confirms Mr. Holkeboer's public acknowledgement. In light of that acknowledgement, Wilsmann respectfully urges the Court to reconsider the petition for rehearing and upon reconsideration to affirm the judgment entered on the jury's verdict.

All facts and inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U S at 587 (quoting *United States v Diebold, Inc*, 369 U S 654, 655 (1962)).

CONCLUSION

For the foregoing reasons, Wilsmann respectfully urges that the motion for reconsideration be granted.

Respectfully submitted,

/S/

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I feel this Court must also be made aware of some of the other shoddy work of the Appellate Court so that this Court can better protect and enforce the Constitution.

On page 6, lines 19-21 of its second opinion, the Appellate Court said, "All facts and inferences must be viewed in the light most favorable to the party opposing the motion," quoting from Matsushita quoting United States v Diebold, Inc, 369 U S 654, 655 (1962).

Since I was the fellow opposing all of Upjohn's motions, I was the party who was to have received that "favorable light" treatment.

I testified that Upjohn had made the same promise to me on 6/16/69, 8/11/69, and 11/6/69, and J. Scott Campbell testified identically to the promises of 6/16/69 or 8/11/69. (Upjohn "fired" Campbell the morning of 11/6/69, so he did not hear the promise repeated that day.)

Had the evidence been truly viewed in the light most favorable to me, that should have been enough to sustain the jury verdict. But on top of that, Grant Young, Upjohn's spokesman from 6/16/69 to 11/6/69 testified four separate times that he had made that promise to me on 6/16/69, 8/11/69 and 11/6/69.

Then Young testified further that in July, 1975, he told Upjohn's Chairman-Chief Executive Officer, R. T. Parfet, that he had indeed made that promise to me and that he expected me to get a bunch of money from Upjohn at that time.

My attorneys called the Appellate Court's attention to all of these Young (Upjohn) promised by page and line number from the trial transcript in our briefs.

Despite all of that, the Appellate Court in its second opinion, page 9, starting on line 18, said, "Moreover, Wilsmann's reliance on the testimony of former* Upjohn employee Grant Young is misplaced, because his testimony relates to the first letter of intent, which was superseded by the second and final agreements." (Emphasis added.)

That quote comes almost verbatim from one of Upjohn's briefs, and has no basis in fact. So much for "favorable light" treatment!

Further, if the Appellate Court is to be permitted to retry cases already tried by a jury, shouldn't they at least be held to the same rules applicable to a jury?

I can recall Judge Gibson at the start of the trial telling the jury that only the evidence presented by witnesses in their sworn testimony and physical evidence accepted by the court as exhibits constituted the facts (evidence) which they were to consider in arriving at their decision at the conclusion of the trial. Judge Gibson said specifically that anything said by attorneys for either side was not evidence in the case and was not to be considered as such by the jury.

Here we find the Appellate Court quoting the words of Upjohn's attorneys, who that court knew, or should have known, were admitted liars, in sustaining the district court decision.

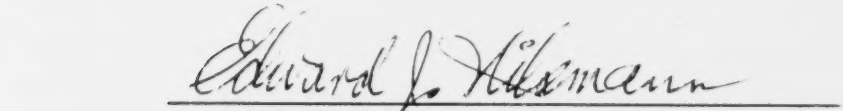
That kind of shoddy work on the part of the Appellate Court cries out for action on the part of this Court.

* Young was in Upjohn's employ at the time of the trial. The trial transcript makes that fact very clearly. This was another attempt by Upjohn's attorneys to lead the Appellate Court to believe that Young's testimony might have been tainted—the "disgruntled former employee" syndrome. Actually, Young continued in Upjohn's employ until only several years ago. Had he quit Upjohn prior to the trial, he might have been even more candid in his testimony.

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



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Dated: March 31, 1989

APPENDIX

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
Park, In re	86-3143	1/3/89	**Affirmed**	S.D.Ohio
Perotti v. Morris	87-3827	1/13/89	**Affirmed & Remanded**	S.D.Ohio
Petrolite Corp. v. Betz Laboratories, Inc.	88-5156, 88-5157	1/9/89	**Affirmed**	E.D.Ky.
Phillip Diniaco & Sons, Inc. v. Max J. Covin & Sons Trucking, Inc.	88-3202	12/23/88	**Affirmed**	S.D.Ohio
Pigs Are Beautiful, Inc., In re	87-4011, 87-4018	1/10/89	**Reversed & Remanded**	N.D.Ohio
Pollock v. Secretary of Health & Human Services	87-2225	1/4/89	**Affirmed**	W.D. Mich.
Riggsbee v. Wilson	88-5644	1/3/89	**Affirmed**	W.D.Ky.
Savage Gateway Supermarket, Inc. v. N.L.R.B.	87-6235, 87-6375	1/6/89	**Order Enforced**	N.L.R.B.
Shaw v. Secretary of Health & Human Services	88-1077	1/17/89	**Affirmed**	E.D.Mich.
Society Nat. Bank v. U.S.	88-3238	12/23/88	**Affirmed**	N.D.Ohio
Stephens v. State of Mich	87-1716	12/21/88	**Affirmed in part, Reversed in part, & Remanded**	E.D.Mich.
Stepp v. Potter	88-5648	1/3/89	**Affirmed**	W.D.Ky.
Suwarsky v. Cornell	87-2083, 87-2110, 87-2140	1/12/89	**Reversed**	W.D.Mich.
Tate v. Secretary of Health & Human Services	88-1089	1/9/89	**Affirmed**	E.D.Mich.
Turner v. Secretary of Health & Human Services	88-5439	1/4/89	**Affirmed**	W.D.Tenn.
U.S. v. Haile	88-5473	1/10/89	**Affirmed**	E.D.Ky.
U.S. v. Henderson	88-3292	1/5/89	**Affirmed**	N.D.Ohio
U.S. v. Kennedy	88-1105	1/3/89	**Affirmed**	E.D.Mich.
U.S. v. Lockhart	88-5338	1/13/89	**Affirmed**	E.D.Ky.
U.S. v. Munoz	87-2137, 88-1009, 88-1095	1/17/89	**Affirmed**	E.D.Mich.

DECISIONS WITHOUT PUBLISHED OPINIONS (Cont.)

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
U.S. v. Padgett	88-5698	1/13/89	**Affirmed**	E.D.Ky.
U.S. v. Queen Mountain Min., Inc.	87-5310	1/4/89	**Appeal Dismissed**	E.D.Ky.
U.S. v. Scales	88-3607	1/10/89	**Affirmed**	N.D.Ohio
U.S. v. Walker	87-5113, 87-5114	1/10/89	**Affirmed**	W.D.Ky.
Walker v. Brown Badgett, Inc.	88-3187	1/6/89	**Affirmed**	Ben Rev Bd
Warden v. Tate	88-3154	12/23/88	**Affirmed**	S.D.Ohio
Warthen v. Story	88-6325	1/3/89	**Appeal Dismissed**	E.D.Ky.
Weatherly v. General Motors Corporation	87-1928	12/9/88	**Affirmed**	E.D.Mich.
Wilsmann v. Upjohn Co.	88-1311	1/9/89	**Affirmed**	W.D.Mich., 681; FSupp.424

No. 88-1311

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD J. WILSMANN,
Plaintiff-Appellant,

v.

THE UPJOHN COMPANY and HOMEMAKERS, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BEFORE: KEITH, KENNEDY and MILBURN, Circuit Judges.

PER CURIAM. Plaintiff-appellant appeals the district court's grant of summary judgment dismissing his action after our remand. For the reasons that follow, we affirm.

I.

Edward Wilsmann commenced this action on June 27, 1977. To date, the litigation has produced four opinions,[1] including one in which we summarized Wilsmann's contentions as "totally implausible" and self-conflicting. *Wilsmann v Upjohn Co*, 775 F2d 713, 723 (6th Cir 1985), *cert. denied*, 476 U S 1171 (1986). The extensive factual basis of this action is reported in *Wilsmann*, 775 F2d at 714-18. Briefly, Wilsmann alleged (1) federal securities laws violations and (2) breach

[1] In chronological order, *see Wilsmann v Upjohn Co*, 572 F Supp 242 (WD Mich 1983); *Wilsmann v Upjohn Co*, 583 F Supp 1060 (WD Mich 1984); *Wilsmann v Upjohn Co*, 775 F2d 713 (6th Cir 1985), *cert denied*, 476 U S 1171 (1986); *Wilsmann v Upjohn Co*, 681 F Supp 424 (WD Mich 1988).

of contract in connection with the transfer of his home health care business to the defendant, Upjohn Company, in 1969[2].

Wilsmann asserted that Upjohn did not perform several oral promises allegedly made in connection with the transfer and his employment agreements. None of the alleged promises appear in the transfer or employment contracts. Discovery in this case lasted for six years.

A jury trial commenced on June 7, 1983. However, four months prior to trial, Wilsmann indicated he wanted to amend his complaint to add a claim of wrongful discharged based upon *Toussaint v Blue Cross / Blue Shield of Michigan*, 408 Mich 479, 292 NW2d 880 (1980). In response, Upjohn filed a motion in limine to prevent Wilsmann from adding a *Toussaint* claim. On the first day of trial, Wilsmann *orally* moved to amend his complaint to add a *Toussaint* claim. The district court denied Wilsmann's oral motion and granted Upjohn's motion in limine. At the close of all proof, Wilsmann moved pursuant to Fed. R. Civ. P. 15(b) to add a *Toussaint* claim, and this motion was also denied.

The case went to the jury on the securities fraud and breach of contract claims. The jury was instructed to consider the state contract claim only if it found for Upjohn on the federal securities claim. *Wilsmann*, 775 F2d at 718. The jury found for Wilsmann on the securities fraud claim and awarded him $1,578,107.00 in damages. As instructed, the jury did not decide the state contract claim.

On appeal, we reversed, holding Wilsmann had failed to produce sufficient evidence to support the verdict. *Id.* at 720. We found two major problems with Wilsmann's case. First, his contentions as to Upjohn's alleged oral promises to pay him additional and substantial compensation were "essential(ly) implausib(le)." *Id.* Second, even if the jury believed one of his allegations, "Wilsmann's very theories as to the content of the promises to him were in conflict, with the

[2] The parties have referred to the transfer as both a "sale" and a "merger". According to the "Plan and agreement of Merger," J. A. at 68-94, Homemakers merged into an Upjohn subsidiary after Wilsmann and the other Homemakers shareholders exchanged all of their stock for Upjohn common stock, at the ratio of one share of Homemakers for 225 shares of Upjohn common stock. JA at 74.

result that the jury was left to sheer speculation." *Id.* We remanded the case "for the district court to determine whether it (would) continue to entertain the pendent claims under state law." *Id.* at 723.

After remand, Upjohn moved for summary judgment on the contract claim, and Wilsmann moved for partial summary judgment on Upjohn's liability for breach of contract. Wilsmann also moved to amend his complaint to add claims of wrongful discharge and common law fraud, but, alternatively, moved for a dismissal without prejudice to pursue all of his state claims in state court. The motion to amend was not granted.

In its opinion of February 20, 1988, reported at 681 F Supp 414, the district court decided that the interests of judicial economy, convenience and fairness to the litigants justified retention of jurisdiction over the state contract claim. In support of its decision, the district court noted that the securities fraud and breach of contract claims arose out of the same nucleus of operative facts,[3] the case had been in discovery for six years, a full trial on the merits had been held, and the only motions pending were those for summary judgment and dismissal solely on legal grounds. *Wilsmann*, F Supp at 425.

The district court then granted Upjohn's motion for summary judgment, concluding that "the contract claim is inextricably woven with plaintiff's fraud claim." *Id.* at 426. In light of our previous holding that Wilsmann's contentions regarding the alleged securities fraud were "conflicting" and "totally implausible", *Id.* at 426, quoting *Wilsmann*, 775 F2d at 720-23, the district court reasoned that the court had *"sub silentio* decided the breach of contract issue as well. Where two or more claims are found conflicting and incapable of separation, the same principles of law which preclude recovery on one claim *a fortiori* preclude recovery on the alternate basis for relief." *Id.* In addition, the district court held that Wilsmann had failed to establish the elements of promissory estoppel necessary "to defeat Upjohn's statute of frauds defense." *Id.*

[3] In his complaint, Wilsmann asserted the state breach of contract claim stated in Count III "and the federal claims pled in Counts I and II derived from a common nucleus of operative facts." J.A. at 27.

II.

A.

The granting of summary judgment must be reviewed in light of the Supreme Court's trilogy of 1986 decisions that clarified the proper analytical framework. *See Matsushita Elec Indus Co v Zenith Radio Corp*, 475 U S 574 (1986); *Anderson v Liberty Lobby, Inc*, 477 U S 242 (1986); *Celotex Corp v Catrett*, 477 U S 317 (1986). In those cases, the Supreme Court explained that the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U S at 251-52. "(T)he requirement is that there be no *genuine* issue of *material* fact." *Id.* at 248. The party opposing a summary judgment motion has the burden of producing proof to support its legal claim, particularly when the opposing party has had an opportunity to conduct discovery. *Celotex Corp*, 477 U S at 322-23.

In reviewing a district court's ruling on a motion for summary judgment, our role is identical to that of the district court, *Hand v Central Transport, Inc*, 779 F2d 8, 10 (6th Cir 1985) (per curiam), and is identical to the standard for granting a directed verdict unde Fed. R. Civ. P. 50(a). *Anderson*, 477 U S at 251-56. (All facts and inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U S at 587 (quoting *United States v Diebold, Inc*, 369 U S 654, 655 (1962).)

Initially, we hold that the district court did not abuse its discretion in retaining jurisdiction over the state contract claim. While "(t)his circuit has moved away from the position that the court has discretion to retain jurisdiction over a pendent state claim where the federal claim has been dismissed *before* trial," *Service, Hosp, Nursing Home and Public Employees U, Loc 47 v Commercial Prop Serv*, 755 F2d 499, 506 n.9 (6th Cir) (emphasis added), *cert. denied*, 474 U S 850 (1985), when lengthy and substantial discovery has taken place, a full trial on the merits has been held, and the anchoring federal claim is dismissed on appeal, "the common sense policy of pendent jurisdiction,"

Rosado v Wyman, 397 U S 397, 405 (1970), compels the conclusion that the district court acted within its discretion. *See Carnegie-Mellon University v Cohill*, 108 S Ct 614, 618-19 (1988).

C.

Wilsmann argues the district court erred in applying federal standards of review to Upjohn's motion for summary judgment. This argument is without merit. "Summary judgment practice in federal district courts is controlled by (Federal Rules of Civil Procedure) Rule 56, unaffected by state procedural rules." *Schultz v Newsweek, Inc*, 668 F2d 911, 917 (6th Cir 1982). Summary judgment in federal courts is proper only where the federal standard is satisfied. *See Reinke v O'Connell*, 790 F2d 850, 851 (11th Cir 1986).

Wilsmann further argues his contract claim raised material issues of fact. In support of his contention, he points to the fact that he is a certified public accountant; and his belief that Upjohn's selection of accounting methods of Homemakers' books exhibited bad faith. Wilsmann also cites to the Joint Appendix to flesh out the claims. However, the only evidence regarding any "installment" or "back-end" payments related to the first letter of intent, which was superseded by the second letter of intent and the final written transfer and employment agreements. J. A. at 527-530, 1042. Our review of the record supports our previous conclusion that Wilsmann's contentions and theories of oral promises of additional compensation are "totally implausible" and self-conflicting. *Wilsmann*, 775 F2d at 723. Therefore, the district court's grant of summary judgment on the state contract claim was proper.

D.

In the alternative, the district court found that the Michigan Statute of Frauds would be a bar to Wilsmann's contract claim. We agree. Michigan law provides that employment agreements which by their terms cannot be performed within one year from their making "shall be void, unless that agreement. . . is in writing and signed by the party to be charged therewith. . . Mich. Comp. Laws Ann. §

566.132(a) (Supp 1988); *See also, Lovely v Dierkes*, 132 Mich. App. 485, _____ , 347 NW2d 752, 753 (1984); *Schipani v Ford Motor Co*, 102 Mich. App. 606, _____ , 302 NW2d 307, 310 (1981).

Wilsmann claims that despite the integration clauses in the transfer and employment contracts, Upjohn made several oral promises of compensation. One of his claims is that he was to recieve a second installment payment after he had worked for Upjohn for more than five years from the date the oral promises were allegedly made. this type of alleged oral agreement "is unenforceable because employment contracts for a term exceeding one year come within the Statute of Frauds." *Schipani*, 302 NW2d at 310. Moreover, Wilsmann's reliance on the testimony of former Upjohn employee Grant Young is misplaced, because his testimony relates to the first letter of intent, which was superseded by the second and the final agreements.[4]

[4] The parties make brief mention of the parol evidence rule that evidence of prior or contemporaneous agreements is not admissible to vary or contradict the terms of a complete and accurate integration. *NAG Ent v Allstate Indus*, 407 Mich 407, 285 NW2d 770, 771 (1979) (per curiam); *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 360 NW2d 876, 880 (1984) (per curiam). The rule poses the threshold question of whether the alleged final integration was intended to be a complete expression of the parties' agreement. *NAG Ent*, 285 NW2d at 771. Wilsmann has claimed at various times that his allegations of contemporaneous oral promises of "back door" payments and/or indefinite renewal of his employment contract until similar bonuses could be paid only supplemented or explained the terms of the writing, or the the transfer and employment agreemeents were not intended to be complete expressions of the parties' agreement, or the contracts were so ambiguous that they required parol evidence for clarification. Upjohn has responded that it has not sought to invoke the parol evidence rule, at least in that it has not opposed the introduction of evidence to supplement the written agreements. But Upjohn's basic defense has been that the evidence Wilsmann offers of prior oral agreements is in the words of this court, "implausible" and self-contradicting.

On appeal, for the first time, Wilsmann attempts to avoid MCLA § 566.132(1), by arguing that this case is controlled by the Statute of Frauds dealing with the sale of securities, MCLA § 440.8319. This approach has no merit. Issues not raised in the district court may not be raised on appeal. *Ralph Shrader, Inc v Diamond Int'l Corp,* 833 F2d 1210, 1214 (6th Cir 1987). Furthermore, this newly raised argument does not salvage Wilsmann's case because section 440.839 requires, as a threshold matter, "separate evidence of a fixed quantity of securities and a definite price for those securities," which is not present in this case. Furthermore, there is no evidence of a writing to satisfy section 440.8319(a), nor an admission to trigger the applicability of section 440.8319(d).

E.

Wilsmann additionally argues he has presented facts sufficient to show promissory estoppel. The district court found Wilsmann's reliance on this doctrine was misplaced, and we agree. As a threshold matter, the alleged oral promises purportedly relied upon must be sufficiently definite and clear to justify reliance. *McMath v Ford Motor Co,* 77 Mich. App. 721 _____ , 259 NW2d 140, 143 (1977). We have previously held that Wilsmann's alleged oral promises are "at least to some degree mutually inconsistent and even conflicting," and "totally implausible." *Wilsmann,* 775 F2d at 723. Thus, the district court was within its discretion in finding Wilsmann's promissory estoppel arguments to be without merit.

F.

Wilsmann's final argument is that the district court erred in denying his motion to amend his complaint to include a *Toussaint* claim. The record reflects that he filed this action on June 27, 1977, and that he amended his complaint twice, the second time on December 4, 1981. This was nearly eighteen months after the Michigan Supreme Court decided *Toussaint.* In his second amended complaint, Wilsmann added Counts VI and VII, which alleged procedural defects in his termination. On the first day of trial, in June 1983, Wilsmann sought for the first time to orally amend his complaint to include a *Toussaint*

claim. He argued "the facts were there and it's just a matter of what theory you apply to it and *Toussaint* applies to a case that was started before *Toussaint*". J.A. at 99.

In denying leave to amend, the district court pointed to the interim between the *Toussaint* decision and the filing of Wilsmann's second amended complaint and found Wilsmann had not properly pleaded a *Toussaint* claim. As earlier stated, Wilsmann moved again at the end of the proof to amend his pleadings, and this motion was also denied.

Motions to amend pleadings under Fed. R. Civ. P. 15 are within the sound discretion of the trial court. *Moore v City of Paducah*, 790 F2d 557, 559 (6th Cir 1986) (per curiam); *Chesapeake [O Ry Co v Newman*, 243 F2d 804, 813 (6th Cir 1957). Unjustified delay, in itself, is an insufficient basis for denying leave to amend, and "(a)buse of discretion occurs when a district court fails to state the basis for its denial or fails to consider the competing interests of the parties and the liklihood of prejudice to the opponent." *Moore*, 790 F2d at 558-59. Here, however, the court stated the basis for its denial, after fully considering Wilsmann's severe delay and unexcused failure to add a *Toussaint* claim to his second amended complaint, and also noted the severe prejudice that would have befallen Upjohn should the amendment have been granted.

Moreover, this is not a case in which Wilsmann could not have discovered *Toussaint* evidence or the *Toussaint* doctrine itself until the last minute. In our view, the district court properly concluded that allowing Wilsmann to add a *Toussaint* claim on the first day of trial would have caused severe prejudice to Upjohn, because *Toussaint* raises the question of when an employer's statements or practices rise to the level of a contractual obligation, *Toussaint*, 292 NW2d at 892, while Wilsmann's second amended complaint concerned alleged procedural deficiencies in his terminatin. adding a *Toussaint* claim would have compelled the parties to try a case vastly different from the one for which they had spent the preceding six years preparing. Finally, Wilsmann's excuse that his failure to add an explicit *Toussaint* claim was duie to his misconception of the law "is not an excuse for the late presentations of an alternative theory of recovery." *Troxel Mfg Co v Schwinn Bicycle Co*, 489 F2d 968, 971 (6th Cir 1973), *cert. denied*, 416 U S 939 (1974).

With regard to Wilsmann's attempt to amend his complaint at the close of all proof under Fed R Civ P 15(b) (which provides for the amendment of pleadings to conform with issues "tried by express or implied consent of the parties" at trial), we would point out that the rule does not apply to issues "tried inadvertently." *MBI Motor Co, Inc v Lotus/East, Inc*, 506 F2d 709, 711 (6th Cir 1974). Wilsmann does not show and indeed it does not appear that anything occurred at trial to indicate that Upjohn expressly or impliedly consented to try the *Toussaint* claim. Therefore, we conclude the district court did not abuse its discretion in denying Wilsmann's motions to amend his complaint either before trial or at the close of all proof.

III.

Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v.

THE UPJOHN COMPANY and HOMEMAKERS, INC.,
Defendants.

File No. K77-317 CA

Hon. Benjamin F. Gibson

OPINION

Currently pending in this matter is defendants', The Upjohn Company and Upjohn Health Services, Inc. (formerly Homemakers, Inc.) (collectively "Upjohn"), motion for summary judgment on Count III of plaintiff Edward Wilsmann's complaint. Plaintiff has filed a response to the motion and, in addition, seeks partial summary judgment in his favor. The underlying factual basis of this lawsuit is reported in *Wilsmann v Upjohn Co.*, 775 F2d 713 (6th Cir 1985), *cert. denied*, 106 S Ct 2893 (1986), and only relevant facts need be repeated here. The case arises out of the merger of Homemakers, Inc. with the Upjohn Company. Plaintiff alleged violations of federal securities law as well as numerous claims under state law. After a trial on the merits, the jury found that Upjohn had violated Section 10b of the Securities Exchange Act of 1934, 15 USC § 78j and the Securities and Exchange Commission's Rule 10b-5, 17 CFR § 240.10b-5. The jury awarded Wilsmann $1,578,107.00 in damages. In an Opinion dated April 11, 1984, this Court denied defendants' motion for judgment not withstanding the verdict or, in the alternative, motion for new trial. *Wilsmann v Upjohn Co*, 583 F Supp 1060 (W.D.Mich. 1984). On appeal, the judgment of the trial court was vacated and the case was remanded by the Sixth Circuit Court of Appeals. *Wilsmann v Upjohn*, 775 F2d at 723. The Court of Appeals held, among other things, that there was insufficient evidence to support a verdict in favor of Wilsmann on his federal securities law claim.

As an initial matter, the Court must decide whether to continue to exercise jurisdiction over plaintiff's pendent state law claim for breach of contract. While this Court may exercise its pendent jurisdiction

to hear state law claims that are related to a federal cause of action properly before the Court, the decision whether to take jurisdiction of such claims is committed to the sound discretion of the district co+B. *United Mine Workers of America v Gibbs*, 383 US 715, 86 S Ct 1130 (1966).

The justification for the Court's exercise of pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to the litigants." *Id.* at 383 US 726, 86 S Ct 1139. The Court finds that retention of jurisdiction over the state law claims will result in more economical use of judicial resources and greater fairness to the litigants. This case has been pending in this Court over ten years. Discovery has taken place as well as a full trial on the merits. Plaintiff's federal and state law claims arise out of the same common nucleus of operative facts. This Court is intimately familiar with both the legal and factual contentions of the parties. The only pending matters are motions for summary disposition on legal grounds. To remand this case to state court at this juncture would be an inefficient use of judicial resources and would constitute an abuse of discretion. The better course of action is for the Court to decide the pending motions. Accordingly, the Court will exercise its discretion and continue jurisdiction over plaintiff's state law breach of contract claim.

The standards for summary judgment in this Circuit are well known and need not be repeated here. *See In re Atlas Concrete Pipe, Inc.*, 668 F2d 905 (6th Cir 1982). Suffice it to say that summary judgment is appropriate where it can be established that plaintiff is unable to prove an essential element of his claim as a matter of law and no reasonable jury could decide in plaintiff's favor. *See Celotex v Catrett*, 106 S Ct 2548, 2557 (1986).

In the instant case, the Court finds that defendants are entitled to judgment in their favor as a matter of law. Plaintiff's breach of contract claim is inextricably interwoven with plaintiff's fraud claim. In the context of the securities fraud claim, the Court of Appeals found that plaintiff's allegations of fraud were both "conflicting" and totally implausible," leaving the jury to engage in "sheer speculation". *Wilsmann*, 775 F2d at 720-23. As a result, the Court of Appeals held that the jury "could not within reason" find that plaintiff was the victim of fraud. 775 F2d at 723. Although the Court of Appeals did not

expressly decide the breach of contract issue, the Court of Appeals, in deciding the securities fraud claim, analyzed the contract issue as well. In reversing the jury verdict, the court noted the existence of numerous interwoven and conflicting claims, one of which was the breach of contract claim. In finding the existence of "implausible and conflicting" claims which precluded recovery on the basis of fraud, the court *sub silentio* decided the breach of contract issue as well. Where two or more claims are found conflicting and incapable of separation, the same principles of law which preclude recovery on one claim *a fortiori* preclude recovery on the alternate basis for relief. Consequently, in light of the Court of Appeal's determination that the implausible and conflicting claims advanced by plaintiff preclude recovery on the basis of fraud, plaintiff is likewise precluded from recovery on the alternate contract theory.

In addition, the Court finds that, even if the Court of Appeals' decision was not dispositive, plaintiff has failed to satisfy the prerequisites for application of promissory estoppel to defeat Upjohn's Statute of Frauds defense. Under Michigan law, the Statute of Frauds provides that an agreement, contract or promise, which by its terms is not to be performed within one year from the making thereof, "shall be void, unless that agreement, contract or promise, or a note or memorandum thereof is in writing and signed by the party to be charged therewith, or by a person authorized by him." MCLA § 566.123(a). In his complaint, Wilsmann alleges that Upjohn breached oral promises made in 1969 which by their terms could not be performed within one year. During the course of the trial, this Court held that the alleged agreements were governed by the Statute of Frauds but further held that in light of plaintiff's allegations of fraud, plaintiff would be allowed to present evidence in support of his breach of contract claim. As a result of the Court of Appeals' ruling, the Court now concludes that plaintiff has failed to satisfy the prerequisites for application of promissory estoppel to defeat Upjohn's Statute of Frauds defense.

Under Michigan law, the threshold requirement for application of promissory estoppel is that the oral promise relied upon must first be "definite and clear." *McMath v Ford Motor Co*, 77 Mich App 721 (1977). *See also Lovely v Dierkes*, 132 Mich App 485 (1984). The

lack of specificity defeats an estoppel claim. *McMath, Id* at 726. reversing the jury verdict on the issue of fraud, the Court of Appeals held that plaintiff's claims are neither definite nor clear. Instead the court held that "Wilsmann's very theories as to the content of the promises to him (are) "in conflict". *Wilsmann*, 775 F2d at 721. As a result of this ruling, there is no basis for applying promissory estoppel to the facts of this case. Since the promises to Wilsmann were required to be in writing to be enforceable and no writing has been produced, plaintiff has failed to produce evidence on an essential element of his claim and Upjohn is entitled to summary judgment in its favor. *See Celotex v Catrett*, 106 S Ct at 2557.

Alternatively, plaintiff contends that his claim for "bonus" payments under the writeen employment contract is still viable, notwithstanding the decision of the Court of Appeals. The Court finds as a matter of law that this claim, like the other contract claims raised by plaintiff, is barred by the opinion of the appeals court. In any event, Upjohn has presented evidence, in the form of expert testimony introduced at trial, that the accounting practices utilized by Upjohn in calculating earnings were reasonable and consistent with generally accepted accounting principles. Plaintiff has failed to present competent evidence, by affidavit, testimony or otherwise, to rebut this evidence and plaintiff has advanced no reason for the omission of such evidence. Although plaintiff asserts that the accounting methods utilized were not undertaken in good faith, this assertion, unsupported by evidence, does not create a genuine issue of material fact and must be disregarded by the Court in determining whether the defendant is entitled to summary judgment. *See Newhouse v Probert*, 608 F Supp 978, 983 (WD Mich 1985). In light of the uncontroverted evidence presented, the Court finds as a matter of law that the calculation of earnings utilized by Upjohn was reasonable and that defendants are entitled to summary judgment on plaintiff's claim for bonus payments allegedly due under the written employment contract.

In conclusion, the Court of Appeals has held that Upjohn is entitled to judgment as a matter of law on Wilsmann's securities fraud claim. In addition, the Court of Appeals has found that the promises relied upon by Wilsmann in support of his lawsuit are inherently conflicting. In light of this finding, there is no basis for applying

promissory estoppel to defeat Upjohn's Statute of Frauds defense. The Court finds as a matter of law that defendants are entitled to summary judgment on plaintiff's breach of oral contract claim. The Court further finds as a matter of law that there is insufficient evidence to support Wilsmann's bonus claim and that Upjohn is entitled to summary judgment in its favor on that issue. Having disposed of plaintiff's remaining claims, the instant lawsuit is dismissed.

/S/
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: February 20, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v.

THE UPJOHN COMPANY and HOMEMAKERS, INC.,
Defendants.

File No. K77-317 CA

Hon. Benjamin F. Gibson

JUDGMENT

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 20th day of February, 1988.

Present: HON. BENJAMIN F. GIBSON, District Judge

In accordance with the Opinion dated February 20, 1988, IT IS HEREBY ORDERED that defendants The Upjohn Company and Homemakers, Inc.'s Motion for Summary Judgment on Count III of plaintiff Edward Wilsmann's complaint is GRANTED and plaintiff Edward Wilsmann's Motion for Partial Summary Judgment is DENIED. The verdict on plaintiff's securities fraud claim having been vacated and the Court having disposed of the remaining claim in this lawsuit, IT IS FURTHER ORDERED that the instant lawsuit is DISMISSED with prejudice and without costs.

IT IS SO ORDERED.

/S/

BENJAMIN F. GIBSON
U.S. District Judge

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-1333 and 84-1334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD J. WILSMANN,
Plaintiff-Appellant,
Cross-Appellee,
v.
UPJOHN CO. and UPJOHN HEALTH CARE SERVICES, INC.,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed October 24, 1985

Before: JONES and WELLFORD, Circuit Judges; and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. In this case, which arises out of the merger of Homemakers, Inc. with the Upjohn Company (Upjohn), the jury found that Upjohn violated section 10(b) of the Securities Exchange Act of 1934 ('34 Act), 15 U.S.C. § 78j (1981), and the Security and Exchange Commission's (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5 (1985), and awarded plaintiff Wilsmann, Homemakers' president and a stockholder, $1,578,107.00 in damages.[1] Both Wilsmann and Upjohn have appealed.

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[1]These sections provide in pertinent part

15 U.S.C. § 78j Manipulative and deceptive devices

I

In 1969, appellant Wilsmann and two other men, Campbell[2] and Wunderlich, were the only shareholders of Homemakers, Inc.,[3] a small Illinois corporation that sold home health care franchises.[4] Wilsmann served as Homemakers' president and

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It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 240.10b-5. **Employment of manipulative and deceptive devices**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[2]The same district judge decided the related case of *Campbell v. Upjohn Co.*, 498 F.Supp. 722 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982). In *Campbell*, the plaintiff originally filed suit in the Connecticut state courts. The action was removed to the federal district court there and then transferred to the western district of Michigan. In *Campbell*, the district court held, and this court affirmed, that Campbell's claims of securities fraud were barred by the Connecticut statute of limitations.

[3]In 1969, 91 Homemakers shares were issued and outstanding. Wilsmann owned 45 shares of Homemakers stock, Wunderlich owned 35 shares, and Campbell owned 11 shares. In addition, 20 debentures that were convertible into 20 shares of Homemakers common stock were owned by various persons not involved here.

[4]Home health care includes the provision of temporary professional and paraprofessional nursing and housekeeping services in the home.

chief executive officer, and Campbell served as marketing director. In 1969, Homemakers, in need of working capital, entered into merger negotiations. In June of 1969, Homemakers decided to merge with Unicare, Inc., a corporation that operated a number of nursing homes. As part of the proposed merger, Unicare loaned $260,000 to Homemakers. Before the merger with Unicare was completed, however, Wilsmann learned that Upjohn might be interested in acquiring Homemakers. Wilsmann then stalled its merger with Unicare and entered into negotiations with Upjohn.

After several meetings and discussions, Homemakers and Upjohn tentatively agreed to a merger in which a new Homemakers, to be formed under Delaware law, would become an Upjohn subsidiary via a stock-for-stock exchange. The proposed merger agreement was reduced to a letter of intent prepared by Upjohn on June 19, 1969 which Wilsmann signed for Homemakers. It expressly did not bind either side. Under the terms of this letter of intent, Upjohn would exchange 225 shares of its stock for each share of Homemakers,[5] and Upjohn also would redeem the debentures at $12,500 each. This letter of intent also provided that at the conclusion of the acquisition, Wilsmann and Campbell each would have a 5.4 percent stock interest in the new Homemakers subsidiary.[6] In addition, this letter of intent provided that Upjohn would have an option to purchase these 5.4 percent stock interests at the end of five years for an amount equal to twenty times the average annual earnings per share of new Homemakers over the preceding five years. It was contemplated that both Wilsmann and Campbell would become key employees of the new Homemakers and that

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[5]Upjohn stock was then valued at approximately $45 per share. Thus Upjohn stock worth $10,125 (225 x $45) would be exchanged for each share of old Homemakers stock.

[6]Although not specifically set out in the June 19, 1969, letter of intent, it is agreed that it was mutually understood that Wilsmann and Campbell would each surrender six of their old Homemakers shares, not for Upjohn stock, but for a 5.4% interest in the new Homemakers to be formed.

its profits would be greatly affected by their performance. Wunderlich would not retain any interest in the new corporation.

Although the letter of intent clearly provided that Upjohn would have an *option* to purchase Wilsmann's and Campbell's shares in new Homemakers *for a price based on earnings*, Wilsmann contends that the actual agreement was dramatically different. According to Wilsmann, Upjohn officials at that time orally promised that Wilsmann and Campbell, but not Wunderlich, in order that Wilsmann and Campbell would receive the "true value" of all of their old Homemakers stock, be paid a "back end" payment of Upjohn stock in exchange for their new Homemakers stock equal to the *total* "front end" payment of Upjohn stock distributed to all three. Specifically, Wilsmann contends that Upjohn orally promised that he and Campbell would receive a total of 17,775 shares[7] of Upjohn stock tax free at the end of five years in exchange for their 5.4 percent interests in new Homemakers to be divided equally. App. 285-86. Wilsmann contends that this "back end" payment was reflected in the letter of intent, not as we have just described and as the parties had orally agreed, but as the five year "earn out" by the option to purchase their new Homemakers stock for an amount based on its earnings. This "earn out" provision was placed in the letter of intent rather than the oral agreement, Wilsmann contends, because it was believed that Wunderlich, an elderly man and an investor, had not contributed anything to Homemakers except his small initial investment and therefore should not be a minority stockholder in new Homemakers and not participate in the "back end" payment. Wilsmann contends that, by incorporating the "back end" payment in the letter of intent as an "earn out" for him and Campbell, Wunderlich

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[7]The computation, *per* Wilsmann, was as follows: 91 issued shares of old Homemakers, less the 12 old Homemakers shares to be surrendered for new Homemakers shares by Wilsmann and Campbell, multiplied by 225, the "front end" exchange rate for Upjohn/Homemakers stock, 91–12=79 x 225= 17,775

would be prevented from obtaining any interest in the new Homemakers subsidiary and receiving any part of the "back end" payment of Upjohn stock to be distributed under the oral agreement. Wilsmann contends that Upjohn understood and indeed promoted this subterfuge.[8]

Under the terms of the letter of intent, as stated, Upjohn would have an option to acquire the interests of Wilsmann and Campbell in new Homemakers in 1975 for an amount based on earnings. Wilsmann claims that he expressed concern about the possibility that the subsidiary would not have any or sufficient earnings during the first five years, and Wilsmann maintains that an Upjohn official promised him that Upjohn would not exercise its option to exchange Upjohn shares for his interest in new Homemakers until a "back end" value equivalent to the "front end" had been achieved. App. 286.[9]

In addition to signing the letter of intent, on June 19, 1969, Upjohn loaned old Homemakers $264,550 to keep afloat, that is, to repay the Unicare loan and $25,000 to provide Homemakers with some working capital. Wilsmann admitted that old Homemakers was "broke" at that time, as indeed it was. App. 293. In return for the loan, Upjohn received promissory notes from old Homemakers, and Wilsmann and Campbell pledged their old Homemakers stock to Upjohn.

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[8] If, as Wilsmann contends, Wilsmann and Campbell were to receive the back end payment of Upjohn stock in order that they receive the "true value" of their interests in old Homemakers, it is difficult to see why Campbell would receive half of these Upjohn shares. It is, moreover, difficult to see why, if the purpose of this subterfuge was only to mislead Wunderlich, Wilsmann did not insist that this oral agreement, inconsistent with the letter of intent, be placed in writing in a side agreement. (Wilsmann was no neophyte, being a certified public accountant and having an M.B.A. degree from Northwestern University. He was 45 years of age at that time.) It goes without saying that, whether or not Wunderlich "deserved" to participate in the back end distribution of Upjohn stock, he, as the owner of old Homemakers stock, was legally entitled to the same rate of payment therefor as Wilsmann and Campbell.

[9] This version of the oral side agreement, it should be noted, is somewhat different from that which Wilsmann apparently relies on in this litigation.

A second letter of intent, which also expressly did not bind either side, was prepared and signed by the parties on August 11, 1969, because the loan from Upjohn to old Homemakers, Upjohn learned, necessitated a restructuring of the terms of the merger for tax purposes.[10] Like the June 19, 1969, letter of intent, the second letter of intent provided that Upjohn would merge with old Homemakers in a stock-for-stock exchange in which the old Homemakers shareholders would receive 225 Upjohn shares in return for each of their Homemakers shares. The second letter differed from the first in that *all* old Homemakers shares would be exchanged in the merger, and Wilsmann and Campbell would have no stock interest in the new Homemakers subsidiary. The exchange rate would be the same, i.e. 225 Upjohn shares for each share of old Homemakers stock. The second letter of intent further provided that at the conclusion of the merger, Wilsmann and Campbell would have entered into five year incentive employment agreements with Upjohn that provided for an annual bonus for each man equal to 21.6 percent of the after tax operating and prebonus earnings of the Homemakers subsidiary less $12,150.[11] Thereafter several drafts of a merger agreement were prepared, and the closing occurred on November 6, 1969. The final merger agreement, dated October 31, 1969, which contained the same provision for exchange of all old Homemakers stock for Upjohn stock as that contained in the second (August, 1969) letter of intent, and which also made reference to the employment agreements, contained an integration clause superseding and nullifying all other agreements to the contrary.

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[10]There is no dispute that, because of the loan by Upjohn to old Homemakers, the acquisition, as contemplated by the June, 1969 letter of intent, would not be tax free. The first plan of merger is referred to in the record as a "Type B" merger; the second plan is referred to as a "Type A" merger.

[11]Upjohn contends that this bonus arrangement set out in the August, 1969 letter of intent was an attempt to approximately replicate, with respect to money to be received by Wilsmann and Campbell, the prior arrangement whereby Upjohn would have had the option to purchase their stock in new Homemakers at a price based on profits.

At the time of the closing, Upjohn presented Wilsmann but not Campbell[12] with a separate employment agreement. Wilsmann's employment agreement, which also contained an integration clause, provided that Wilsmann would be employed by new Homemakers as president from the date of the merger until November 30, 1974. The agreement further provided that if neither new Homemakers nor Wilsmann gave the other written notice of a desire to terminate the agreement thirty days prior to the expiration of the five year period, then the agreement would continue in effect until either gave the other thirty days notice of termination. Under the terms of the agreement, Wilsmann would receive a basic annual salary of not less than $40,000. The agreement also provided a bonus payment for Wilsmann based on profits in substantially the same terms as those contained in the second (August, 1969) letter of intent.[13]

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[12]Campbell was not hired because he misrepresented his educational achievements. Campbell claims that immediately before the closing, Upjohn officials confronted him regarding the misrepresentations in his resume and told him that he could either resign from Homemakers before the merger or that he would be fired immediately after the merger. Campbell testified that he was so humiliated by Upjohn's actions that he signed a letter of resignation and the merger agreement without reading them. 676 F.2d at 1125.

[13]The compensation provision in the employment agreement provided as follows:

> 3. *Compensation*
>
> As compensation for the services and duties to be rendered by Wilsmann hereunder, Homemakers agrees to pay Wilsmann as follows:
>
> (a) A basic salary of not less than $40,000 per annum, payable in equal monthly installments, plus
>
> (b) In the event the earnings of Homemakers are sufficient as hereinafter set forth, a bonus shall be paid to Wilsmann for each of the five twelve-month periods commencing December 1, 1969, in an amount by which 21.6% of the Net Earnings of Homemakers exceeds $12,150. The said bonus, if due, shall be payable on the first day of the month of July following the expiration of the twelve-month period for which a bonus is due.
>
> (c) "Net Earnings" of Homemakers shall mean the Net Earnings after taxes of Homemakers or the appropriate portion of the Net Earnings

Although the second letter of intent and the formal merger document and employment agreement provided that Wilsmann was to receive Upjohn stock for his old Homemakers stock and was to receive a bonus for the first five years based on profits, Wilsmann contends, again, that the oral agreement was dramatically different. He agrees that he was to receive, as he did receive, 225 shares of Upjohn stock for each of his forty-five old Homemakers shares, a total of 10,125 shares, of a value of $455,625.[14] (Parenthetically, Upjohn shares split two for one in 1973 so Wilsmann then had 20,250 shares worth approximately $104 per share or a total of about $2,106,000. App. 419.) He contends, however, that as a "back end" payment under the oral agreement he and Campbell were together to receive, in cash, at the end of the five years an amount equal to the 1969 value of 17,775 shares of Upjohn stock or $799,875. This, however, Wilsmann contends, was to be the minimum; if the bonus formula called for a larger amount, they were to receive that. He further contends that since, under the original oral understanding, he and Campbell were to receive the 17,775

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after taxes of any corporation into which Homemakers shall have been merged or with which it shall have been consolidated for the filing of tax returns or to which it shall have sold all or substantially all of its assets, determined in accordance with generally accepted accounting principles promulgated by the American Insitute of Certified Public Accountants, Inc., applied in accordance with Upjohn's accounting practices, adjusted as follows:

(i) Eliminate the tax effect of any prior year's losses.

(ii) Eliminate the amount of the bonus, net of the income tax benefits applicable thereto, to be paid to Wilsmann pursuant to this Agreement.

In computing Net Earnings, interest on any loans made by Upjohn or any subsidiary of Homemakers shall be at a rate not in excess of 1% over the then applicable prime rate for preferred customers of First National City Bank, New York, New York.

(d) Wilsmann shall be entitled to the customary employee benefits of Homemakers during the term of this Agreement.

[14]It appears that, though for purposes of the merger Upjohn stock was given its June, 1969 value of $45 per share, by the time of the merger it was actually worth $48 per share so that Wilsmann received stock worth $486,000.

shares tax free, they would receive the $799,875 tax free—that is, enough would be added to pay the income taxes on such payment. Of course, as heretofore stated, Campbell was not hired, but Wilsmann contends that since, in 1973, Upjohn stock split two for one, he alone should have received at the end of five years the cash equivalent as of 1969 of 17,775 shares or $799,875. App. 310-15.

Under the terms of the second letter of intent, the merger document and the employment agreement, as stated, Wilsmann would be entitled for five years to a bonus based upon earnings and in accordance with a prescribed formula. Wilsmann contends that he "expressed concern that he would not receive 'true value' under the written terms of the merger and employment contract, but plaintiff was assured by The Upjohn Company that said contract would be extended until he received true value." App. 17.[15]

On July 31, 1974, in accordance with the terms of the employment agreement, Upjohn told Wilsmann that his employment contract with Homemakers would not be extended beyond December 31, 1974, but that he was performing satisfactorily and would be continued as an employee. Wilsmann remained an employee as Homemakers' president until he was fired on December 17, 1976, for alleged insubordination. During the five years in which the bonus provision was in effect, according to Upjohn's accountants, the Homemakers subsidiary incurred substantial losses. Upjohn, therefore, informed Wilsmann from time to time that he was not entitled to any employment bonuses.

II

Wilsmann filed an action against Upjohn and Homemakers on June 27, 1977. The complaint contained several counts,

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[15]This version of the second oral side agreement, it should be noted, is somewhat different from that which Wilsmann apparently relies on in this litigation.

including an antitrust count, but for present purposes it is only necessary to relate that he alleged fraud in violation of the Securities and Exchange Act (15 U.S.C. § 78j and Rule 10b-5 (17 C.F.R. § 240.10b-5)) promulgated thereunder and a claim under state law for breach of contract. The case was tried to a jury, and issues were submitted with respect to fraud under the federal statute and regulation and breach of contract under state law. The jury was instructed to consider the state law claim only if it found for the defendants on the federal law claim. The jury found for Wilsmann on the federal law claim, awarding him damages in the amount of $1,578,107. Accordingly, it did not render a verdict on the state law breach of contract claim. On motion for Wilsmann, the district court ordered payment of prejudgment interest of $970,000. The district court then denied defendants' motion for a new trial and judgment n.o.v. Both sides have appealed.

Wilsmann contends that the district court erred in its decision that Wilsmann, by arguing to the jury for money damages, had thereby made an election that barred his claim for rescission or rescissional damages. Wilsmann further contends that the district court erred in its charge to the jury on the measure of damages. Finally, Wilsmann contends that the district court erred in denying his motion to amend the complaint to allege common law fraud and for wrongful discharge under the doctrine of *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

Upjohn and Homemakers assert that the district court erred in not granting their motion for a judgment n.o.v. on the ground that Wilsmann's claim was not properly within the scope of the federal securities laws. They further assert that the motion for a judgment n.o.v. should have been granted on the ground that, in the light of the specific provisions in the documents executed by the parties, including the integration clauses, the position and background of the parties, and the essential implausibility of Wilsmann's contentions with respect to oral side agreements, a jury could not within reason find for Wils-

mann as it did. Upjohn and Homemakers further contend that the district court erred in failing to instruct the jury with respect to the applicable six year statute of limitations. Finally, Upjohn and Homemakers assert error in the refusal of the district court to receive evidence that the jury had actually awarded prejudgment interest as part of its verdict.

III

Upjohn and Homemakers contended in the district court and contended here that the federal securities law and regulation upon which Wilsmann relied do not apply because the transaction involved was a sale of a business. Without citing the authorities, we can state that the circuits (other than this one, which has not taken a position) were divided on the issue of whether the federal securities law did apply to the sale of a business. Since then, however, the Supreme Court has decided that this federal law does apply to the sale of a business. *Landreth Timber Co. v. Landreth*, 105 S.Ct. 2297 (1985) and *Gould v. Ruefenacht*, 105 S.Ct. 2308 (1985). Upjohn and Homemakers have conceded this point and therefore we need not deal further with it.

Upjohn and Homemakers also contend that the federal securities law does not apply here because, in economic reality, Wilsmann's complaint was that there was fraud involved in inducing him to enter into the employment contract and that there was a breach of such employment contract and that there is no fraud charged with respect to the Upjohn stock that Wilsmann received for his Homemakers stock.

On the contrary, Wilsmann's claim is that he sold his stock in old Homemakers to Upjohn for Upjohn stock and for promises made to him by Upjohn of cash and other benefits which Upjohn did not intend to keep; that is to say, he asserted a claim of promissory fraud with respect to his sale. Wilsmann's allegations as to promises by Upjohn that it did not intend to keep (some of which were heretofore set out) were these: that he would at the end of five years be paid an additional "back end"

payment for his stock, that the bonus period would be extended until the bonus paid would satisfy the "back end" obligation, that Upjohn detail men (pharmaceutical salesmen) in the field would be used to promote new Homemakers, that new Homemakers would incur no interest expense as a result of loans made to it by Upjohn, and that he would be employed for life.

In *Mansback v. Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979), this court, holding that § 10b and Rule 10b-5 should be liberally construed to effectuate the policies of the Act (*id.* at 1024), stated:

> As a general matter, however, private § 10(b)/Rule 10b-5 damage claims can be said to require: 1) the use of jurisdictional means 2) to implement a deceptive or manipulative practice (with the requisite scienter) 3) in connection with 4) the purchase or sale 5) of a security 6) causing 7) damages.

Id. at 1026.

The question here is whether the thrust of Wilsmann's claim is promissory fraud "in connection with" the purchase of Wilsmann's shares in old Homemakers.

In *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), the Court (*per* Justice Douglas) held that the sale of securities involved there was covered by the federal securities laws because the seller "suffered an injury as a result of a deceptive practice *touching* its sale of securities as an investor." *Id.* at 12-13 (emphasis added).

The case that perhaps comes closest to supporting Upjohn's contention is *Chemical Bank v. Arthur Andersen*, 726 F.2d 930 (2d Cir. 1984), *cert. denied* 105 S.Ct. 253 (1984). In that case, a company pledged the stock of a subsidiary to secure loans, and the contention was that officers and the accounting firm of the borrower made fraudulent misrepresentations as to the financial condition of the borrower. There was no fraud alleged, however, with respect to the stock of the subsidiary that was

pledged. The question presented was whether this claim based on fraud with respect to the financial condition of the borrower could be maintained under the federal securities laws. The Second Circuit (*per* Friendly, J.) agreed with the plaintiff banks that the pledge of the subsidiary's stock was a purchase and sale of the stock within the meaning of the federal statute and regulation. The court, however, disagreed with the banks that it was sufficient, for application of the federal statute and regulation, that *but for* the pledge of the stock of the subsidiary, the loans would not have been made and held that the federal securities laws were not applicable. Judge Friendly agreed with Professor Loss that Justice Douglas's use of "touching" in *Bankers Life* was nothing more than the Justice's variation of "in connection with" as a matter of literary style. *Id.* at 942.

The case before us, however, is clearly distinguishable from *Chemical Bank*. Here it is Wilsmann's contention and testimony that the consideration for the sale of his old Homemakers stock to Upjohn was not only the Upjohn stock then received but also the false promises by Upjohn as to what he would receive later for his old Homemakers stock. The *Chemical Bank* decision might be applicable here if Wilsmann's contention were that the Upjohn stock received upon the surrender of his old Homemakers stock was all that he was promised for his stock and that he would not have sold his old Homemakers stock to Upjohn *but for* a false promise of life employment with a bonus.

Accordingly, we determine that Wilsmann's claim on the basis of which he received a jury verdict could be prosecuted under the federal law and regulation upon which he relied.

IV

As stated, Upjohn and Homemakers further contend that the district court erred in not granting a directed verdict and in not granting a judgment n.o.v. on the ground that there was not sufficient evidence to support a verdict based on alleged fraud and under the federal securities law and regulation.

We have concluded that Upjohn and Homemakers are correct in this contention. We believe that, even if there were enough evidence here to be pieced together to support a verdict on one of Wilsmann's theories as to Upjohn's alleged promises, Wilsmann's very theories as to the content of the promises to him were in conflict, with the result that the jury was left to sheer speculation. We will first deal with the problem created by the essential implausibility of Wilsmann's contentions and then demonstrate the conflict *inter se* in his testimony as to what the core agreement was between him and Upjohn.

As stated, in 1969 Wilsmann was forty-five years of age, a certified public accountant and held an M.B.A. degree from Northwestern. Although home health care was a valid concept, Homemakers was broke and could not go public for funds. It was absolutely necessary that Homemakers find funds to stay afloat, and a merger appeared to be the only course.

Under the terms of the first letter of intent of June, 1969, Wilsmann would, for his old Homemakers stock, get 8775 shares of Upjohn stock (39 x 225) worth $45 per share or $394,875. In addition, he would receive a 5.4 percent interest in new Homemakers, which shares Upjohn would have an option to purchase in five years at a price based on average earnings per share over five years. Wilsmann executed the letter of intent and did not contend that he did not understand it.

Nevertheless, Wilsmann contends that the foregoing was not the real understanding as to what he was to be paid for his 5.4 percent interest in new Homemakers. Wilsmann contends that, in order that he and Campbell would receive the "true value" of all their old Homemakers stock, in five years they would assuredly receive 17,775 shares of Upjohn stock to be divided equally. This figure was, according to Wilsmann, arrived at by multiplying the total number (91) of old Homemakers shares outstanding, reduced by the twelve shares that he and Campbell would exchange for the new Homemakers stock (79), by 225. Thus their "back end" payment would in part be a payment for Wunderlich's stock. There is, however,

no explanation as to why, if he and Campbell were to be paid the "true value" of their old Homemakers stock, Campbell would receive half of the 17,775 shares, and there is no apparent reason therefor since Wilsmann had forty-five shares and Campbell had only eleven. As a matter of fact, if Upjohn were obligated in five years, when Wilsmann and Campbell would surrender their 5.4 percent interests in new Homemakers, to pay them enough Upjohn stock to insure their receipt of the "true value" of their old Homemakers stock, there is no apparent reason why the formula should be reduced by the twelve shares to be surrendered for the 5.4 percent interest in new Homemakers so that the formula would have been 91 x 225 or 20,475 shares to be divided evenly by Wilsmann and Campbell.

Wilsmann contends that, under this June, 1969, oral side agreement, Wunderlich was to receive none of the "back end" payment of shares, and that the provision in the letter of intent for the option to purchase Wilsmann's and Campbell's shares in new Homemakers for a price based on earnings was placed there to mislead Wunderlich. Wilsmann attributes this alleged chicanery to Upjohn, contending that Upjohn insisted that if this subterfuge were not employed, Upjohn would also have to make a "back end" payment of Upjohn shares to Wunderlich. Wilsmann never explains, however, why, if Upjohn was willing to make a "back end" payment of 17,775 shares, equal to the total "front end" payment, in five years to compensate for the "true value" of old Homemakers, Upjohn would object to Wunderlich's receiving his pro rata share of this distribution. Nor does Wilsmann explain why he did not insist that this oral side agreement, of such great importance to him, be memorialized by a written side agreement. Apparently he considered asking Upjohn for what he called a "dresser drawer deal," i.e. a written side agreement, but did not do so. App. 295.[16]

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[16]It is noted that while Wilsmann attributes to Upjohn the claimed chicanery to cheat Wunderlich, Wilsmann, under his contention, participated therein even though Wunderlich was a stockholder in old Homemakers of which Wilsmann was president!

Wilsmann had another version of this oral side agreement which in part recognized the provision in the June, 1969 letter of intent and is somewhat different from the version that called for the payment to Wilsmann and Campbell of 17,775 shares at the end of five years in any event. It will be remembered that under the letter of intent Upjohn would have an option to purchase Wilsmann's and Campbell's 5.4 percent interests in new Homemakers at the end of five years for a price based on earnings of new Homemakers. Wilsmann contends that he raised the question of what would happen if new Homemakers' earnings were deficient. He contends that Upjohn's response was that it would "not exercise [its] option until the true value is there." App. 286-87. Under this version, it appears that Upjohn would not have an unqualified obligation to deliver 17,775 shares at the end of five years, and, instead, it would defer exercise of its option until the earnings of new Homemakers under the formula would support a distribution of 17,775 shares of Upjohn stock to Wilsmann and Campbell.

The second letter of intent of August, 1969 provided that Wilsmann, Campbell and Wunderlich would each receive 225 shares of Upjohn stock for each of their old Homemakers shares and Wilsmann and Campbell would be employed by Upjohn on a salary and bonus arrangement. Neither Wilsmann nor Campbell would receive any shares in new Homemakers. These were the actual terms of the formal merger and employment documents executed in November, 1969. Wilsmann received at that time 10,125 (45 x 225) shares of Upjohn stock at $45 (or $455,625) which was actually by then at $48 per share or $486,000. Wilsmann's employment agreement explicitly set out precisely how his bonus based on earnings was to be determined and even contained a specific provision as to the maximum rate of interest to be charged by Upjohn to the new Homemakers subsidiary.

Contrary to the integration clauses in the closing document effecting the merger and in Wilsmann's employment agreement, Wilsmann contends that there was, again, an oral side

agreement that conflicted with the foregoing documents. According to Wilsmann this was again done to mislead Wunderlich but there was no explanation as to why there was no written side agreement. In any case, Wilsmann contends that under this oral side agreement, instead of receiving 17,775 additional shares to be divided equally as under the first oral agreement, he and Campbell were to receive the cash equivalent of such shares, based on the 1969 value, tax free in five years, to be divided equally.[17] This payment would be made in order that they would receive the "true value" of their old Homemakers stock.

Wilsmann had another version of this second oral agreement which in part recognized the provisions in the August, 1969, letter of intent and in the merger document and employment agreement. It will be remembered that in the second letter of intent and in the merger document and employment agreement Wilsmann was to receive a bonus based on earnings of new Homemakers. Wilsmann contends that he "expressed concern that he would not receive the 'true value' under the written terms of the merger and employment contract, but plaintiff was assured by The Upjohn Company that said contract would be extended until plaintiff received the true value." App. 17. Thus his contention here was that he was guaranteed that the five year bonus agreement would be extended until he received the cash equivalent of the Upjohn shares originally promised. Under this version, it appears that Upjohn would not have an unqualified obligation to pay the cash equivalent of 17,775 shares at the end of five years and, instead, that it would continue the bonus arrangement until the earnings of new Homemakers would support a cash distribution equivalent to the 17,775 shares.

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[17] It should be noted, however, that Wilsmann also testified that no person ever told him that they would not get the 17,775 shares contemplated by the first oral side agreement. App. 734.

While the employment agreement expressly placed a limit on the interest rate that Upjohn could charge for loans to the new Homemakers subsidiary, Wilsmann contends that Upjohn orally agreed that it would not finance new Homemakers by interest-bearing loans to it and that, therefore, in making such loans consistent with the employment agreement, Upjohn thereby reduced the profits of new Homemakers and that this also was fraudulent conduct. Wilsmann also contends that Upjohn failed, contrary to its promise, to use its detail men in promoting new Homemakers, and although the written agreements contained no obligation to do so, he contends that this failure reduced the profits of new Homemakers and that this also constituted fraud. Moreover, the original complaint alleged that "The Upjohn Company impliedly represented that the successor Homemakers['] net earnings which determined Plaintiff's 'back-end' payment would be calculated in a reasonable and good faith manner." App. 20. Thereafter it alleged that the net earnings were not so calculated and the complaint sets out twelve particulars in which there was fraud in the calculation of net earnings. App. 20-22. These claims of fraud which allegedly improperly reduced the profits of new Homemakers were apparently in support of Wilsmann's alternative theory, viz, that his "back-end" cash payment for the old Homemakers stock would ultimately come to him under the bonus agreement.

At the request of the chairman of Upjohn, on June 10, 1975, Wilsmann submitted a lengthy memorandum to support his contention that he had not received that which he had been promised by Upjohn. This document contains a great number of complaints about the financing and operation of new Homemakers but contains no assertion that he had been promised a guaranteed "back end" payment for his old Homemakers stock. Wilsmann's reason for not including this, he testified, was that he had been requested by the chairman to omit it. App. 422.

Although Wilsmann alleged in his original complaint, by interlineation, that he had been employed "for life" (App. 22),

in an amendment to the complaint he alleged that his discharge was "a nullity" because he could only be discharged by the board of directors of Homemakers and that the board had taken no such action.[18]

To summarize, not only are Wilsmann's contentions totally implausible but they are also in conflict each with the other:

Wilsmann contends that at the time the parties executed the first letter of intent the oral agreement was that he and Campbell were to receive, in any event, at the end of five years, 17,775 additional shares of Upjohn stock to be divided evenly. But he also contends, partially recognizing the option provision in the letter, that Upjohn orally agreed that it would not exercise the option to purchase his and Campbell's interest in new Homemakers until the earnings were such as would entitle them to 17,775 shares of Upjohn.

Wilsmann contends that at the time the parties executed the second letter of intent, the merger document and employment agreement, that the oral agreement was that he and Campbell were to receive, in any event, at the end of five years, the cash equivalent of 17,775 shares, valued as of 1969, with an additional amount to cover their taxes. But he also contends, partially recognizing the bonus provision in the letter, the merger document and the employment agreement, that Upjohn orally agreed that the five year contract providing for the bonus would be extended until he received in bonus the cash equivalent of the Upjohn shares originally promised.

Thus we conclude that the jury was left to sheer speculation with respect to the alleged fraud that Wilsmann claimed induced him to enter into this merger agreement. A jury could not within reason find on this proof that Wilsmann had been

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[18]This contention that Upjohn had orally promised Wilsmann employment "for life" is in direct conflict with the employment agreement. We note that Wilsmann does not contend that the employment agreement with respect to his tenure was also a subterfuge to mislead Wunderlich.

a victim of fraud as he claimed. These contentions are at least to some degree mutually inconsistent and even conflicting. It is impossible to tell which theory or contention or combination thereof, if any at all, was accepted by the jury. A directed verdict or a judgment n.o.v. should have been granted to Upjohn. 9 Wright and Miller, Federal Practice & Procedure, § 2524.

V

As stated, Upjohn also contends that the district court erred in not charging the jury on Upjohn's statute of limitations defense and in effect directed a verdict on that issue. We note that Wilsmann's counsel also requested the district court to submit the statute of limitations issue to the jury. While this claim of error presents a close question, we need not decide it since we are vacating the judgment on another ground.

VI

On remand, it will be for the district court to determine whether it will continue to entertain the pendent claims under state law. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

Entered 10-21-83

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v. Case No.: K77 317 CA4

THE UPJOHN COMPANY
and
HOMEMAKERS, INC.
foreign corporations,
Defendants.

MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

NOW COME Defendants, The Upjohn Company and Upjohn Health-Care Services, Inc., and move this court for a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) and for a new trial pursuant to Federal Rule of Procedure 59(a) as follows:

I. Defendants are entitled to a judgment notwithstanding the verdict on the ground that the "stock" plaintiff sold to The Upjohn Company was not a "security" under the Securities Exchange Act of 1934 and, therefore, plaintiff failed to state a federal cause of action;

II. Defendants are entitled to a judgment notwithstanding the verdict on the ground that plaintiff did not file suit within the applicable limitation period;

III. Defendants are entitled to a new trial on the ground that the jury should have been permitted to consider defendants' statute of limitations defense;

IV. Defendants are entitled to a new trial on the ground that irrelevant and prejudicial testimony was presented to the jury.

This motion is based on the records, files and testimony presented in this case and the brief of Defendants filed in support hereof.

Dated: 21, October, 1983

Respectfully submitted,
BROWN, COLMAN &
DeMENT, P.C.

/S/_____
Thomas G. Parachini

/S/_____
Dirk J. Holkeboer

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(616) 381-7030

Entered 4-11-84

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v. File No. K77-317 CA

UPJOHN COMPANY, et al.,
Defendants. OPINION

_____/

This matter was tried to a jury over ten trial days. At the close of the proofs, and after due deliberation, the jury returned a verdict for the plaintiff in the amount of $1,578,107.00. Now before the Court is defendants' motion, pursuant to Rules 50 and 59, Fed. R. Civ. P., for judgment notwithstanding the verdict and new trial. For the reasons set out below, the motion is denied.

The legal standards to be applied on these motions are clear. In *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-1105 (6th Cir. 1978) (citations omitted), the court stated:

> The issue raised by a motion for a judgemnt n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury . . . This determination is one of law to be made by the trial court in the first instance . . . In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor . . . If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

In contrast to testing the legal sufficiency of the evidence in a motion for judgment n.o.v., a motion for new trial "is confined almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). A new trial may be granted where the verdict rendered is contrary to the clear weight of the evidence, or excessive, or to prevent a miscarriage of justice. *Peacock v. Board of Regents*, 597 F.2d 163 (9th Cir. 1979). A new trial would also be warranted when a verdict is reached on account of bias, passion, prejudice, corruption or other improper motive. *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979). However, a trial court does not properly grant a new trial merely because it might have come to a result different from that reached by the jury. *Rios v. Empresa Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978).

The defendants have asserted two grounds for each type of relief sought. They seek a j.n.o.v. on the grounds that the stock sold by the plaintiff was not a security within the meaning of the Securities Exchange Act of 1934 and that the action was barred by the statue of limitations. They seek a new trial on the grounds that the Court erred in not allowing the jury to decide the statute of limitations issue and in allowing irrelevant and prejudicial testimony to be presented to the jury.

The defendants' first argument in support of their motion for a judgment n.o.v. is that the transaction upon which the lawsuit was based did not involve "securities" within the meaning of the federal securities laws. *See, e.g.*, 15 U.S.C. §78c(a)(10). The defendants argue that the Court should apply the "economic realities test" to determine whether this transaction falls within the scope of the securities laws. *See United Housing Foundation v. Forman*, 421 U.S. 837, 848-51 (1975); *Union Planters National Bank v. Commerical Credit Business Loans*, 651 F.2d 1174, 1180-81 (6th Cir. 1981). More specifically, the defendants seek to have the Court apply the "sale of business doctrine," see *Fredericksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981), and hold that the transaction does not fall within the scope of the securities laws because Upjohn purchased all of the stock of Homemakers, including that stock owned by the plaintiff.

WILSMANN v UPJOHN CO. K77-317 CA4

Entered 4-11-84

In its opinion of February 9, 1983, this Court decided that the sale of business doctrine should not be applied. This decision was based on *Golden v. Garafalo,* 678 F.2d 1139 (2d Cir. 1982), in which the sale of business doctrine was rejected by the Second Circuit. The Court still is persuaded by the reasoning in *Golden.*

As the Second Circuit noted, 678 F2d at 1144, the economic realities test was applied in *Forman* as the second part of a two-part test. It was applied only after the Supreme Court determined that the instruments in question, although called "stock," did not possess the "characteristics traditionally associated with stock." 421 U.S. at 851. These characteristics include the right to receive dividends, negotiability, and whether the instruments can be pledged or hypothecated, confer voting rights in proportion with the number of shares owned, and appreciate in value. Only after these charcteristics were found not to be present did the Court apply the economic realities test. *Id.*

The Court is persuaded by the Second Circuit's reasoning in *Golden* regarding the significance of this two-part test:

> Having first determined that the shares were not stock, the Court went on to determine whether they were an "investment contract" and applied the three-pronged "economic reality" test of *(SEC v. W. J. Howey Co.,* 328 U.S. 293 (1945)). The actual analysis utilized in *Forman,* therefore, is inconsistent with the sale of business doctrine. If "economic reality" is the universal jurisdictional test under the (Securities) Acts, no matter what the facial or legal character of the instrument, there was no need to examine whether the . . . shares were stock according to conventional criteria, since an affirmative answer would have been irrelevant. The doctrine thus seems to assume that a major part of the discussion in *Forman* was pointless.

678 F.2d at 1144. In the instant case, because, in the plaintiff's hands, the stock which was sold to Upjohn possessed all of the aforementioned characteristics, it was not necessary to proceed to the second step of the *Forman* analysis.

The Court also finds significant the fact that, in the leading cases dealing with the sale of business doctrine, the allegedly defrauded party was the purchaser of the "stock." *See Landreth Timber Co. v. Landreth*, __ F.2d __, No. 81-3446 (9th Cir. March 7, 1984); *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982); *Fredericksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981). The Seventh Circuit itself noted this distinction in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981). In determining that the sale of business doctrine did not apply when a purchaser allegedly committed fraud in purchasing all of the stock of a company when the stock constituted "securities" in the hands of the sellers the court stated:

> To conclude otherwise would be to hold that a purchaser of corporate shares may deprive investors/sellers of the protections of the securities laws if it can arrange that all of the corporation's shares are purchased at one time. Whatever the breadth of language, clearly *Frederiksen* does not require such a result.

651 F.2d at 468 n.5. This reasoning is equally appropriate where three shareholders sell the stock as when a large number of shareholders sell their stock. For all of these reasons, the Court is of the opinion that this action properly was brought under the Securities Exchange Act of 1934.

The defendants also seek j.n.o.v., as well as a new trial, on the ground that the Court improperly ruled that the plaintiff's lawsuit was not time-barred as a matter of law. This ruling was based on the fact that the original agreement would not necessarily have been completed until the "back-end" payment was made. As the Court noted in its Opinion of October 28, 1980 in this matter, at 5, "[n]o bonus payment was due until July 1, 1971, which is within the six-year (limitations) period." After considering the evidence adduced at trial, the Court determined that, as a matter of law, this was the point at which the fraud reasonably should have become apparent and the point at which the limitations period began to run. The defendants have made no arguments which the Court did not consider in its prior rulings on this matter and therefore, for the reasons already stated, the motions for judgment n.o.v. and for new trial based on the statue of limitations

are denied.

The final ground asserted for a new trial is that the defendants were prejudiced by the admission of certain testimony regarding the current value of Upjohn HealthCare Services and that this prejudice was not cured by a later instruction to the jury to disregard the testimony. The Court finds this argument to be without merit.

The defendants argue that this testimony created an impression that the plaintiff had been underpaid for his share of Homemakers-Illinois. Presumably, this would have increased the award of damages. The Court, however, is of the opinion that the defendants have not made any showing of prejudice because of this testimony.

First, the Court assumes that the jury followed the instructions given to it, see, e.g., *Parker v. Randolph*, 442 U.S. 62, 73 (1979), including the instruction to disregard this testimony. Second, the Court believes that the amount of damages awarded by the jury "was *clearly* within 'the maximum limit of a reasonable range.' " *Smith v. John Swafford Furniture Co.*, 614 F.2d 552, 553 (6th Cir. 1980) (emphasis in original). This is particularly true in light of the fact that the defendants chose to present no evidence relating to the value of the plaintiff's share of Homemaker-Illinois.

For all of the above reasons, the defendants' motion for judgment n.o.v. and/or new trial is denied.

Dated: April 11, 1984

/S/
BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,

Plaintiff,

v. File No. K77-317 CA

UPJOHN COMPANY, et al.,

Defendants. ORDER

/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 11th day of April, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON
DISTRICT JUDGE

In accordance with the Opinion dated April 11, 1984, IT IS HEREBY ORDERED that the defendants' motion for judgment not withstanding verdict and/or new trial is denied.

IT IS SO ORDERED.

/S/
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Entered 4-12-84

Entered June 20, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v. File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORAL MOTION FOR
DIRECTED VERDICT

MR. HOLKEBOER: Your Honor, the Defendants are moving at this time for directed verdict as allowed by the Federal Rules of Procedure 50 (8-A). The directed verdict is proper when in viewing "the evidence in the light most favorable to the party against whom the motion is made there is a complete absence of pleading or proof of an issue or issues material to the cause of action or there are no contraverted issues of fact upon which reasonable men could differ." From *Grim v. Leinart*, Appellate Number 81-5737 from the 6th Circuit, filed April 19, 1983, and their quoting a case entitled Rockwell, which is found at 688F(831). "Standard to be applied in ruling on a motion for direct verdict is when the evidence is such without weighing the testimony of the witness are considering the weight of the evidence that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made.

Caufme v. Mully Narfotis,

also 6th Circuit, as to the State law claims, "State law controls as to whether there was sufficient evidence presented to withstand motion for direct verdict," and it quotes from *Garrison v. Jervis B. Webb Company*, 583F(258-261), also a 6th Circuit opinion. "In Michigan the proper test for determining whether the motion should be granted is whether or not evidence was offered upon which reasonable minds would differ." *Armstrong v. LeBlanc*, 395, Mjch. 526.

Your Honor, Count I of the Plaintiff's Complaint is a claim on the Federal Securities Act for fraud in violation of 10B5. Plaintiff has alleged in his complaint a series of material false inducements

which he relied on in entering this acquisition by Upjohn. Those material inducements which he claims are that the Upjohn's detailment would be made available to Upjohn and Homemakers, and that this would be a profitable venture. Two, that interest on money loaned by Upjohn to Upjohn Homemakers would not be a significant factor in executing that income for purposes of Plaintiff's incentive employment bonus.

Three, that Plaintiff was promised a minimum payment and that the employment contract would be extended until the bonus equaled this minimum payment.

Four, that Upjohn Homemakers would have its own in-house finance.

Five, that the merger would be a type B tax-free exchange.

Six, that net earnings for the purpose of Plaintiff's incentive employment bonus were to be determined in a reasonable and good faith manner, and seven, that Plaintiff would receive customary Upjohn employment benefits as provided in the contract, and Plaintiff alleges that these benefits were denied to him because Upjohn calculated his seniority date from the date of the merger rather than this date of initial employment from Homemakers.

Defendants are moving at this time for directed verdict on the basis of two reviewed legal arguments, and arguments based on the facts developed in trial.

First, we are renewing our argument that Statutes of Limitation in this case would bar Plaintiff's securities fraud claim. As discussed by this Court in the Campbell decision, general rule is that a limitation period begins to run when the claimant discovers or, in the exercise of reasonable diligence, should have discovered the act constituting the alleged fraud. The statute does not await Plaintiff's leisurely discovery of the full details of the alleged scheme. Instead, once he has or ought to have knowledge of the fact from which wrong doing could reasonably be inferred, he must attempt to get at the whole truth. Reasonable diligence is an objective standard that requires behavior of the sort expected of the well-known reasonably prudent person.

WILSMANN v UPJOHN CO. File No. K77-317 CA4

Entered June 20, 1983.

In this case, Defendants must show that the Plaintiff knew or should have known before June, 1971 of the fact that would have put a reasonable person in Plaintiff's position on notice of the possibility of fraud and second, to investigate further. The Plaintiff's own testimony in this case that he knew in 1969, prior to the closing, that the transaction would not be the type B merger, which he alleges had been promised to him, but that it would occur in another form. Any change tax consequence of this, if there were any, were known at that time. Further, he knew in November of 1969 that Scott Campbel, another shareholder who had also been promised employment with the future payment based on net earnings or based on a guaranteed amount, had not been hired by Upjohn.

As to Scott Campbell's employment, the Court ruled that that testimony regarding that may be relevant as to scienter, and that in that form it did come into this case. Plaintiff was certainly aware in November of 1969 that he did not receive an employment agreement. These facts would have sent a reasonable person to investigate the circumstances of the acquisition and to seek assurance about his arrangement with Upjohn at that time, well before June of 1971. Thus, Plaintiff does not come within the Statute of Limitations.

Secondly, Defendants would also like to renew its position for the record that this transaction does not come under the Security Exchange Act 934 under the sale of business exception to the definition of securities as to the two arguments based on the facts as developed at trial.

Plaintiff alleged material misrepresentation which induced him to enter this transaction with Defendants. He has offered no evidence regarding two of those inducements, those being the in-house financing company or the customary employee benefits. Three of the other inducements relate only to arguments that Plaintiff's bonus under the employment contract was not properly calculated. That argument being that the 21.6 percent of the net earnings should have yielded him some bonus. Those inducements are that there would not be a significant interest charged to Homemakers — Upjohn Homemakers in the calculation of his bonus, that the use of detail men would boost gross

sales of the company, therefore, hopefully increasing his bonus payment and that there would be good faith calculation of the bonus.

As developed in this trial before the Court, however, Plaintiff's proof is done to attack the calculation of that payment. His entire fraud case is that the guaranteed payment was fraudulently promised. While Plaintiff's testimony regarding a change from B to A, or the interest charge or the detail men may be admissible as to scienter, there is not sufficient testimony to bring a claim for fraud to the jury on those representations.

Defendants ask the Court to direct a verdict as to each of the pled material inducements except the alleged promise for a guaranteed payment for a stipulated amount.

Finally, as to that claim which they have brought before the Court, the fraud claim based on this alleged promise of a future payment, Defendants move for directed verdict on this promise on the ground that no evidence has been offered on the element of reliance. Plaintiff must establish that he relied on that allegedly false misrepresentation and decided to enter into the transaction.

Unlike intent, which is in the state of the mind of the Defendant and can be inferred and rightfully can be inferred from the actions of the Defendant, the reliance of Plaintiff is in a state of mind of the plaintiff, yet my recollection is that the Plaintiff has never testified, but for the promise for Upjohn, he would not have sold his Homemakers' stock. He may believe this, but I don't believe that the proofs have demonstrated that he was asked that question. His lack of proof of an element of 10B5 action is fatal and directed verdict should be granted.

Entered June 21, 1983.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v.

File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORDER DENYING DEFENDANTS MOTION FOR DIRECTED VERDICT

THE COURT: The Defendants have moved for a motion for a directed verdict pursuant to provisions of Federal Rules of Civil Procedure 50 (a). It's undisputed that in order for a court to grant a motion for directed verdict that Court first of all must view the evidence most favorably toward the party who is opposing the motion. In this case the party opposing the motion is the Plaintiff. So the Court must construe that evidence most favorably toward the Plaintiff.

It's also undisputed in deciding a motion for directed verdict at this stage the Court does not weigh the credibility of the witnesses.

In the final analysis if the court concludes that there is sufficient evidence from which a jury could reasonably find by a preponderance of the evidence for the Plaintiff then the motion for directed verdict should be denied.

Conversely if there is not sufficient evidence from which a jury could reasonably find by a preponderance of the evidence for the Plaintiff, then the motion for directed verdict should be granted.

In this particular case both Mr. Wilsmann and Mr. Campbell have testified regarding the essentials of the so-called back end payment. That is to say, that they have both testified that the back end payment was in effect guaranteed by representations of Upjohn. Whether or not that is true involves a question of credibility for the jury to decide. But, based on the evidence at this point the Court must consider that evidence as true.

WILSMANN v UPJOHN CO. File No. K77-317 CA4
Entered June 21, 1983.

In that light with reference to the allegation set forth in Count One, which is a violation of Rule 10b5 of the Securities Act in that count the Plaintiff claims certain misrepresentations or false promises made to the Plaintiff by Upjohn and/or it's representatives in order to induce the Plaintiff to agree to the merger. Among the representations allegedly made was the represenation that the employment agreement would be extended until such time as the back end payment could be secured.

There are other alleged misrepresentations made by the representatives of Upjohn testified to by the Plaintiff and others. The Court is of the opinion based upon the record as it stands now that there is sufficient evidence from which a jury could find by a preponderance of the evidence for the Plaintiff on the allegations set forth in Count One and therefore, the motion to dismiss the allegation set forth in Count One is denied.

Entered June 22, 1983.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v. File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORAL MOTION TO
RENEW DIRECTED
VERDICT AND ORDER
DENYING MOTION

MR. HOLKEBOER: Just one brief thing. In order to preserve our motion for directed verdict, I would just like to state for the record that — restate for record those motions at this time.

THE COURT: The Court will consider that the arguments that you made previously regarding the motions to dismiss and/or for directed verdict are preserved.

MR. HOLKEBOER: Thank you.

THE COURT: And you need not make any further argument on those motions.

MR. HOLKEBOER: Thank you. We have nothing further.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the Court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted,

the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

AFFIDAVIT

STATE OF MICHIGAN)
)
COUNTY OF KALAMAZOO)

PATRICK M. WALSH, being first duly sworn, deposes and says as follows:

1. I am an attorney employed by the law office of Walsh & Miller P.C. d/b/a Walsh, Miller, Rayman & Langeland, Attorneys.

2. On Monday, August 18, 1986, I had lunch in downtown Kalamazoo and sat next to a table of four or five men.

3. I overheard a man whom I later identified as Attorney Dirk Holkeboer talking about The Upjohn Company and a trial he had worked on for them.

4. He spoke with regard to a Motion for Directed Verdict and said, "They were right. - I made the motion. - I never mentioned sufficiency. - I made the motion!"

5. He further stated that "there was this meeting of June 16, 1969 - there was probably some loose talk at that meeting by the Upjohn people, but... ."

6. At that point, I indentified myself as working for the firm on the other side of that case.

7. Further, Deponent sayeth not.

/S/
PATRICK M. WALSH

Subscribed and sworn to before
me this 2nd day of September, 1986.

Jacqueline Altom, Notary Public
Kalamazoo County, Michigan
My Commission Expires: 7/17/88

No. 88-1720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD J. WILSMANN,

Petitioner,

v.

THE UPJOHN COMPANY

and

UPJOHN HEALTH CARE SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 24, 1989

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner is entitled to reconsideration, under the guise of a new petition for certiorari, of the Court's determination in 1986 not to review the Sixth Circuit's 1985 decision that respondents were entitled to judgment n.o.v.

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IN THE

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EDWARD J. WILSMANN,

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THE UPJOHN COMPANY

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Rule 22.1 of the Rules of the Court, Respondents The Upjohn Company and Upjohn Health Care Services, Inc. (collectively "Upjohn")[1] oppose the

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[1] In accordance with Rule 28.1, respondents state that Upjohn Health Care Services, Inc., is a wholly-owned subsidiary of The Upjohn Company, which in turn has no parent company. The two companies have various subsidiaries and affiliates that are not wholly-owned, but most of those exist outside the United States. Within the United States, such companies include Chugai Upjohn, Inc., Cobb-Vantress, Inc., North Coast Hospital Home Care, Inc. and CARETEC, Inc.

petition for a writ of certiorari filed by Edward J. Wilsmann.[2]

STATEMENT OF THE CASE

This is the second occasion on which Wilsmann has brought this case to the Court. Indeed, it is the second time Wilsmann has argued to the Court that the decision in 1985 of the United States Court of Appeals for the Sixth Circuit should be reversed because Upjohn assertedly did not adequately preserve the issue of the sufficiency of the evidence at the trial of this matter held in 1983. Wilsmann's statement of the case is inaccurate and incomplete, but the relevant facts are conveniently summarized in the two unanimous opinions of the Sixth Circuit. *See* the Appendix to the Petition ("Pet. App.") at A3 and A18. The following statement therefore includes only a brief description of the lengthy record.

Wilsmann is an experienced accountant and businessman who in 1969 was president of Homemakers, a small company then selling franchises for the provision of home health care. By Wilsmann's own estimate, the company was "broke."[3] When Wilsmann was unable to arrange a public offering of Home-

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[2] Wilsmann's petition includes "Homemakers, Inc." as a respondent. Homemakers was the company's name in 1969 at the time of its acquisition by Upjohn, but its name has subsequently been changed and its present name is Upjohn Health Care Services, Inc.

[3] Trial transcript ("Tr.") 207.

makers' stock, he negotiated the company's acquisition by Upjohn. The parties first contemplated an arrangement under which Wilsmann would have been given an investment interest in Upjohn's new Homemakers' subsidiary, which Upjohn would have had a later option to purchase. This proposal was abandoned after Upjohn was compelled to lend large sums of money to satisfy Homemakers' urgent financial needs. Later in 1969, the parties instead adopted a different arrangement under which Homemakers became a wholly-owned subsidiary of Upjohn and Wilsmann's proposed investment interest was eliminated. The terms of the acquisition were embodied in a detailed written agreement expressly described as the parties' "entire" agreement, superseding "all prior agreements and understandings."[4] Wilsmann executed the agreement on behalf of Homemakers.

The parties also agreed that Wilsmann would become an employee of the new subsidiary. Upjohn and Wilsmann entered into a written employment contract that again represented their "entire" agreement, expressly superseding all prior understandings.[5] In addition to salary and other benefits, the employment contract permitted Wilsmann to earn employment bonuses contingent upon the sufficiency of Homemakers' post-acquisition earnings, as determined by an eligibility formula set forth in the contract.[6]

Wilsmann brought this action in 1977, alleging violations of the federal securities laws and breach of contract. His claims were vague and inconsistent, but

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[4] Plaintiff's Trial Exhibit 2 at 26.

[5] Plaintiff's Trial Exhibit 28 at 6-7.

[6] Pet. App. at A24 n.13.

included allegations that Upjohn had breached the employment contract by failing to pay employment bonuses and had violated the securities laws by failing to make a "back-end" payment assertedly promised to him orally in 1969. At trial, Upjohn moved unsuccessfully for a directed verdict, based in part upon the insufficiency of the evidence. The jury returned a verdict for Wilsmann regarding his claim under the securities laws, but did not reach his contract claims. Following trial, Upjohn filed a timely motion for judgment notwithstanding the verdict. Upon appeal, Upjohn argued in part that the trial court erred in denying a directed verdict and judgment n.o.v. because of the insufficiency of the evidence.

The Sixth Circuit held unanimously that the trial court erred in not granting judgment n.o.v., and remanded the case for further consideration of Wilsmann's contract claims. The court held that Wilsmann's unsupported testimony regarding the alleged oral promise was "in conflict," requiring the jury to indulge in "sheer speculation." Pet. App. A36. It emphasized that Wilsmann's contentions were not only "totally implausible" but "also in conflict each with the other." *Id.* Accordingly, the court of appeals held that a jury "could not within reason" have found that fraud occurred. *Id.* Wilsmann sought rehearing *en banc*, arguing for the first time that Upjohn had not properly preserved the issue of the sufficiency of the evidence for appellate review. After further briefing addressed to the preservation issue, the Sixth Circuit denied rehearing.

Wilsmann thereupon filed a petition for a writ of certiorari in this Court, again arguing in part that Upjohn failed to preserve the issue of the sufficiency

of the evidence. The Court denied the petition. *Wilsmann* v. *The Upjohn Co.*, 476 U.S. 1171 (1986).

During the pendency of the petition, the parties filed cross-motions for summary judgment in the district court regarding Wilsmann's remaining state law contract claims. On September 3, 1986, Wilsmann filed a Second Supplement to his summary judgment motion attaching an affidavit reciting that one of his counsel had overheard one of Upjohn's counsel say in a luncheon conversation at a restaurant[7] that he did not believe the issue of the sufficiency of the evidence had been adequately preserved.[8]

On February 20, 1988, the district court granted summary judgment to Upjohn on Wilsmann's remaining contract claims. Pet. App. A12. The court held that this result was required by the Sixth Circuit's 1985 opinion, but that, in any event, Wilsmann's claims were foreclosed by Michigan's Statute of Frauds. Pet. App. A13-16.

On January 9, 1989, the Sixth Circuit unanimously affirmed the district court's judgment. Pet. App. A3.

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[7] Wilsmann's counsel was apparently seated at a different table in the restaurant, and was not himself a participant in the alleged discussion.

[8] In January 1987, while the cross-motions for summary judgment were pending before the district court, and more than six months after this Court denied his petition for a writ of certiorari, Wilsmann filed for reconsideration of the Sixth Circuit's denial of his motion for rehearing *en banc*. The motion for reconsideration was also based on the comments allegedly made at the restaurant by Upjohn's counsel. The Sixth Circuit denied the motion in an order dated February 16, 1987. Thereafter, Wilsmann filed a motion to recall the Sixth Circuit's mandate in the case based again on the alleged luncheon conversation. The Sixth Circuit denied that motion on March 9, 1987.

The court reiterated its previous holding that Wilsmann's claims are "totally implausible" and "self-conflicting," *id.* at A7, and affirmed the district court's judgment that, in any case, his claims are barred by the Michigan Statute of Frauds. *Id.* at A7-9. This petition followed.

REASONS WHY THE WRIT SHOULD BE DENIED

Certiorari should plainly be denied. Wilsmann does not challenge either the district court's award of summary judgment or the Sixth Circuit's 1988 decision affirming that award. Both decisions were independently based on requirements of Michigan law, and there is no claim that those requirements were erroneously applied. Instead, Wilsmann claims that his counsel's eavesdropped account of an alleged luncheon conversation three years after the trial requires the Court once again to consider the Sixth Circuit's 1985 decision that respondents were entitled to judgment n.o.v. In essence, he seeks reconsideration of the Court's denial in 1986 of his first petition for a writ of certiorari.

In the first appeal to the Sixth Circuit, Upjohn argued vigorously that the evidence at trial was insufficient to support the jury's verdict. Wilsmann did not claim that the issue had not been adequately preserved until he petitioned for rehearing of the Sixth Circuit's decision. In response, Upjohn drew the Sixth Circuit's attention to the relevant portions of the trial transcript, including comments by counsel and by the

trial court.[9] After consideration of the issue, the court unanimously denied rehearing, noting that "no judge of this Court" had even "requested a vote . . . ."[10] The preservation issue was then fully presented to this Court by Wilsmann in his unsuccessful 1986 petition for a writ of certiorari.

There is no basis for further review. What one of Upjohn's counsel might have said in a luncheon conversation three years after the trial is simply irrelevant. Even if it were assumed that plaintiff's counsel accurately overheard the conversation in 1986, the only relevant fact is what actually occurred in 1983 as reflected in the trial transcript. The Sixth Circuit had the full trial record before it, and, after consideration of the parties' rehearing memoranda addressed specifically to the preservation issue, rejected Wilsmann's claim. This Court left the Sixth Circuit's decision undisturbed in 1986, and there is no occasion now to reconsider that result.

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[9] Tr. 889-990, 918, 1277. *See also* Opposition of The Upjohn Co., *et al.*, Wilsmann v. The Upjohn Co., No. 85-1712, at 7-9 (1986).

[10] *See* Pet. App. A22 in the petition for a writ of certiorari in Wilsmann v. The Upjohn Co., et al., No. 85-1712 (1986).

CONCLUSION

No substantial issue of federal law exists or is presented here. There is no occasion either to review the Sixth Circuit's 1988 decision or to reconsider this Court's denial of certiorari in 1986.

Respectfully submitted,

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May 24, 1989